

Missouri. Supreme Court

REPORTS

OF



CASES ARGUED AND DECIDED

IN THE

SUPREME COURT

2851 F

OF THE

STATE OF MISSOURI.

BY B. F. STRINGFELLOW,

ATTORNEY GENERAL AND EX OFFICIO REPORTER.

REPUBLISHED IN COMPLIANCE WITH A RESOLUTION OF THE GENERAL ASSEMBLY OF THE
STATE OF MISSOURI, APPROVED MARCH 3d, 1851.

BY EPHRAIM B. EWING, SECRETARY OF STATE.

VOL. IX.

JEFFERSON CITY:
JAMES LUSK, PUBLIC PRINTER.

1851.

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**JUDGES OF THE SUPREME COURT OF THE STATE OF
MISSOURI:**

HON. GEORGE TOMPKINS,*
HON. WILLIAM B. NAPTON,
HON. WILLIAM SCOTT,
HON. PRIESTLY H. McBRIDE.

ATTORNEY GENERAL:

BENJAMIN F. STRINGFELLOW.

* The Hon. G. TOMPKINS having attained the age of 65 years on the 20th day of March, A. D. 1845, his office became vacant, and the Hon. P. H. McBRIDE was appointed on the 27th day of March, A. D. 1845.

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SUPREME COURT.

JANUARY TERM, 1845.

GABRIEL S. CHOUTEAU vs. PIERRE, (of color.)

1. In a suit for freedom, it is a good objection to a juror, that he would feel bound by his conscience to find a verdict in favor of the plaintiff, notwithstanding the law should hold him in slavery.
2. It is not necessary to show any positive enactment of law in order to establish the existence of slavery.
3. The existence of slavery *in fact* being established, it devolves upon the plaintiff, he being a negro, to show the law forbidding it.
4. The courts of this State will judicially take notice of the laws of France and Spain, which were in force in this State while a part of the territory of those governments.
5. They will not take notice of the laws of Canada, but the legality of slavery under those laws, is a question of fact for a jury.
6. The ordinance of 1787 for the government of the north-western territory, had no force in any post or precinct in that territory in the possession of Great Britain, prior to the first of June, 1796. A slave held within any such post, prior to that time, acquired no right to his freedom by virtue of such ordinance.

APPEAL from St. Louis Circuit Court.

SPALDING & TIFFANY, for Appellant.

POINTS AND AUTHORITIES.

1. The question whether slavery existed in Canada, was a fact for the jury, which the court excluded from their consideration, by its instructions.
2. That instruction can be justified only on the supposition that there was *no evidence* whatever of slavery in Canada, or not sufficient to go to the jury.
3. There was sufficient evidence to be left to the jury: 3 Mo. Rep. 544. That slavery of the blacks has been tolerated in all the American colonies, and no legislative act exists introducing it.

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4. The holding of plaintiff's mother as a slave in a portion of the North-west territory, by British subjects, before the same was surrendered to the American government by Great Britain, and before the American laws were ever in force there, could not free her. That portion of the country was retained, because the American government failed on their side to fulfil the treaty. The British troops were therefore instructed to hold the western posts, and the government of the United States was officially informed, that the posts were and would be held for that purpose. This occupation was legalized by the subsequent action of the government. When the Constitution was formed and went into operation, his Britannic Majesty was informed that the treaty was fulfilled on our part, and he then stipulated for the surrender of the posts: 1 vol. Brown's laws of U. S., 206. Speech of Gen. Washington to Congress of 7th December, 1786.

GEORGE W. NABB, *for Appellee.*

POINTS AND AUTHORITIES.

1. That Rose, the mother of the appellee, being a native of Montreal, Canada, a British province, she became thereby free, and the plaintiff entitled to his freedom. Law of slavery, by Wheeler, 348, 349, 406.

2. That Rose having resided in the town of Michilimacinae, in 1794 in Prairie du Chien, 18 months or two years after that time whether same places were a part of the British possessions, or a part of the Territory north-west of the river Ohio, subject to the ordinance of Congress of 1787—and the appellee was born of her subsequently, he is entitled to his freedom. *Winny vs. Whiteside*, 1 Mo. R. 334.—*Merry vs. Tiffin*, 1 Mo. Rep. 520. *Hays vs. Dashed*, — vol. Mo. Rep. Law of slavery, p. 356.

3. If the mother of Rose ever had been a slave and resided in Prairie du Chien after the year 1787, she became emancipated, and the appellee being born of her subsequently to that time, became free. Same authorities cited in No. 2. Law of slavery, by Wheeler, p. 355, 339.

4. That if Rose was born in Canada, a province of the British government, there was no evidence to show that slavery existed in that province. And there being no evidence to prove that she was a negro or a woman of color—that Pierre, the appellee, being her son, is entitled to his freedom, vide record.

5. That the instructions of the court were properly refused, as offered

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by the defendant's counsel—and that the instructions of the court, that slavery or involuntary servitude did not exist in the Canadas, was correct—and that Rose being the mother of the appellee, and a native of Canada, he is thereby entitled to his freedom.

SCOTT, J., *delivered the opinion of the Court.*

This was a suit for freedom, brought by Pierre against Chouteau, in which a judgment was rendered for Pierre, to reverse which this appeal is prosecuted.

The petition of Pierre sets forth that his mother, Rose, was a negress, and was born in Montreal, in Lower Canada, about the year 1768.—That in the year 1791, or thereabouts, his mother was taken from Montreal to Prairie du Chien, in the North-west Territory of the United States, by one Stork, where she remained until his death in and about the year 1794, rendering service to him and his family. That about the year 1795, Andrew Todd took Rose, his mother, from Prairie du Chien, and brought her to St. Louis, where she was sold in October of that year, to one Didier, a priest; and in August, 1798, she was sold by Didier to Auguste Chouteau, with her two children, Didier conveying the slaves to Chouteau without warranty of title, though Todd conveyed to Didier with warranty. That while his mother was in the service of Chouteau, she had several children, amongst whom was the petitioner. That after the death of A. Chouteau, the petitioner came into the possession of the petitioner in error, G. S. Chouteau, by whom he is held in slavery.

Pierre based his right to freedom on two grounds. First, That his mother, Rose, was born free, being a native of a British province, in which slavery was not tolerated. Secondly, That if his mother was a slave by her residence at Prairie du Chien, she became free by virtue of the ordinance of 1787, for the government of the North-western Territory.

On the part of Pierre, evidence was introduced conducing to prove that Rose was a slave or servant, and her residence at Mackinaw and Prairie du Chien about the time stated in the petition. During the period of Rose's detention at Prairie du Chien, that post was in the possession of British subjects. It was shewn in evidence that Pierre was born in St. Louis. A conveyance of Rose, who it appears was acquired from the representatives of the estate of John Stork, dated Oct. 1795, and executed by Andrew Todd, a merchant of Montreal, in Canada, to one Didier, a curate of the parish of St. Louis, was read

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in evidence; also, a conveyance of Rose and her two children made by Didier to A. Chouteau. This conveyance was dated in Aug., 1798.

The defendant below gave evidence tending to show the actual existence of slavery in Canada in the year 1786—that slaves were recognized as property, and subject to be sold; that Rose, the mother of Pierre, was sold as a slave in Canada. A treaty and documents relative to the North-western posts by Great Britain, were read in evidence.

The court excluded from the consideration of the jury, all the evidence tending to prove the existence of slavery in Canada, to which an exception was taken.

The following instructions, asked by the plaintiff in error, were refused by the court: "1. That the facts that the mother of the plaintiff was born and held as a slave in Canada, and was at Mackinaw and Prairie du Chien, while these places continued in the possession of the British government, do not, nor does either of them entitle the plaintiff to his freedom. 2. If the jury find from the evidence, that slavery existed in Canada, that the mother of the plaintiff was there held as a slave, the fact of her residence in Canada, or other places at the time in the possession of the British government, and before the surrender of these places, does not entitle the plaintiff to his freedom."

Exceptions were taken to the refusal of these instructions.

The court instructed the jury that slavery or involuntary servitude never did exist in either of the Canadas. An exception was taken to the giving this instruction.

Before the jury were sworn, the defendant below asked leave to inquire of the jurors, when sworn to answer questions, if any of them felt bound in conscience to find a verdict in favor of the freedom of the plaintiff, notwithstanding the law might hold him in slavery. The court refused to permit this question to be put to the jury, to which refusal an exception was taken.

The first point we will notice, is that growing out of the refusal of the court to allow a juror to be asked if he felt in conscience bound to find a verdict in favor of the freedom of the plaintiff, notwithstanding the law might hold him in slavery. We cannot well conceive how a juror could be considered as indifferent between the parties, who labored under the bias supposed by the question. Nor do we see what objection can be urged against its propriety. An affirmative answer does not tend to the disgrace or infamy of the juror. We know that there are many in our sister States who do entertain such opinions; they may find their way amongst us, and so long as slavery is tolerated in this

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State, our courts should be clothed with the power of preventing our laws from being openly set at defiance, and under the pretence of administering justice, to permit jurors to trample in the dust the rights of property of our citizens. No loyal or faithful citizen will object to answering the question. He will fully appreciate the motives which prompt it, and while he laments the cause which renders such an inquiry necessary, he yields a ready obedience to the law which prescribes such a test, in order to ascertain his fitness as a juror in cases involving the right to property of the species claimed by the defendant in error.

We are not without authority on this question. In the case of *Mima Queen vs. Hebburn*, 7 Cranch, 290, which was a suit for freedom, a juror was called, who, upon being questioned, avowed his detestation of slavery to be such that, in a doubtful case, he would find a verdict for the petitioner, and that he had so expressed himself in the very case, and that if the testimony were equal he should certainly find a verdict for the petitioner. The court which tried the cause, instructed the triers that he did not stand indifferent. This was assigned for error in the supreme court, and chief justice Marshall, in delivering its opinion, observed, that jurors should be superior to every exception, they ought to stand perfectly indifferent between the parties, and that the court below exercised a sound discretion in not permitting the juror to be sworn. The objection now under consideration is much more forcible than that in the preceding case, for it supposes that the juror will not find a verdict for one of the parties, let the law and the evidence be as it may; whereas, in the other, the juror had only declared that in case of a doubt, or equipoise of the testimony, the claimant should have the benefit of it. On another occasion, chief justice Marshall, speaking of the qualifications of jurors, remarks: "I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the Constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it: this is not to be expected—certainly the law does not expect it, where the jurors, before they hear the testimony, have deliberately formed and delivered an opinion. The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions."

The instruction given to the jury, viz: "that slavery or involuntary

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servitude does not and never did exist in either of the Canadas," is complained of by the plaintiff in error. There was some evidence conducing to show that slavery did actually exist in Canada at the time the mother of the plaintiff (Pierre) was detained in that country; and the instruction can only be predicated on the idea that the proof of the existence of slavery can only be established by positive enactment, an idea entirely inconsistent with the history of the introduction of slavery into America. In the colonies owned by European powers on this continent, the existence of slavery was recognized by many enactments, but no legislative memorial has been discovered which expressly authorized the subjecting of the African race to bondage. The Kingdoms of Europe possessing colonies in America, from motives of cupidity supplied them with African slaves, and this commerce of the mother country was the foundation, and the right of the colonists to hold the slaves in servitude. Slavery seems to have had no other origin in America. So ardently did the English nation engage in this commerce, that it was persisted in, although against the remonstrances of a colony into which the slaves were introduced. England was delighted with the article of the treaty of Utrecht, by which she obtained the *asiento* or contract for supplying the Spanish colonies with negroes, which had formerly been enjoyed by France. Spain it seems was the first European kingdom to introduce negroes into America, with a view of relieving the Indians from servitude. The territory of which this State composed a part, has been subject to both the kingdoms of France and Spain; and our courts take judicial notice of the laws which prevailed here under their respective governments. Canada, prior to the treaty of 1763, was a colony of France. We know that no law ever existed here under the French and Spanish governments, which expressly authorized the slavery of negroes, although such slavery did in fact exist.—Nor has such a statute been found in any of the British colonies, although slavery existed in all of them. *Seville vs. Chretien*, 1 Con. Louisiana Rep. 367. *Robertson's History of America*. *Margaret vs. Chouteau*, 3 Mo. Rep. 375.

There was evidence conducing to show, that slavery did in fact exist in Canada, and if there was a law prohibiting it, by what authority did the court take judicial notice of that law?

The statute under which Pierre sues, he being a negro, requires that he should prove his right to freedom. Then it would seem that it devolved on him to show the law forbidding negro slavery; for from the preceding account of the origin of slavery in America, a court would

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not be warranted in saying, that institution was illegal in places where it actually existed, for want of a law expressly authorizing it.

As to the ground on which Pierre bases his right to freedom, growing out of the fact of his mother being held as a slave in the posts of the northwestern territory, contrary to the ordinance of 1787, which prohibited slavery within its limits, we are of opinion that the possession of these posts by British subjects, at the time of her detention at them, prevented the operation of the ordinance within their limits and jurisdiction. It is assumed that the courts will take notice of the history of the country. Greenleaf's Evid. 7 Hardin's Rep. 98. Hart vs. Bodley. Treaties are a part of the supreme law of the land, and will be judicially noticed by our courts. By the definitive treaty of Paris, dated Sept. 3d, 1783, Great Britain stipulated to withdraw all her armies, garrisons and fleets from the United States, and from every post, place and harbor within the same. This treaty was not fulfilled on the part of Britain, she alledging as a justification of her conduct in this respect, a violation of other articles of the treaty, by the United States; this dispute was continued between the two countries until the 19th of Nov., 1794, when a treaty of amity, commerce and navigation was concluded between Great Britain and the United States. By the second article of this treaty, Great Britain stipulated to withdraw all her troops and garrisons from all posts and places within the boundary lines assigned by the treaty of peace to the United States; the evacuation took place on or before the — of June, 1796; the United States extending in the meantime at their discretion, their settlements to any part within the said boundary line, except within the precincts or jurisdiction of any of the said posts. All settlers and traders, within the precincts or jurisdiction of said posts, were to continue in the unmolested enjoyment of all their property of every kind, and be protected therein. They were to be at full liberty to remain there, or remove with all or any part of their effects, and they were free to sell their houses, lands or effects, or to retain the property thereof, at their discretion; such of them as continued to reside in the said boundary lines, were not to be compelled to become citizens of the United States, or to take any oath of allegiance to the government thereof; but they were to be at full liberty to do so if they thought proper, and they were to make and declare their election within one year after the evacuation aforesaid. On the 7th December, 1796, General Washington, then President of the United States, in a speech, addressed to the two houses of Congress, informed them that the period during the late session, at which the appropriation was passed for carrying into effect the treaty of amity, commerce and navigation between

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the United States and his Britannic Majesty, necessarily procrastinated the reception of the posts stipulated to be delivered, beyond the date assigned for that event. As soon, however, as the Governor General of Canada could be addressed with propriety on the subject, arrangements were cordially and promptly concluded for their evacuation, and the United States took possession of the principal of them, comprehending Oswego, Niagara, Detroit, Michilimacinac and Fort Miami. American State papers, p. 30, vol. 1; title, Foreign Relations.

Thus it appears that the northwestern posts were not, until after 1st June, 1796, surrendered by Great Britain—that her subjects within them owed no allegiance to our government—that they were protected in the enjoyment of their property, and that the United States restrained themselves from extending their jurisdiction within the said posts or precincts, until after the period assigned for their surrender; thus clearly showing that before that period they claimed no jurisdiction in the said posts or precincts. The foregoing provisions of the treaty of 1794, clearly show that the ordinance of 1787, for the government of the Northwestern Territory, never had any force or validity in the posts or precincts occupied by Great Britain. It appears the mother of the plaintiff Pierre, was taken from Prairie du Chien to St. Louis before the period assigned for the surrender of the posts, and that during her detention at that place, it was in the possession of British subjects.—Then she could never have acquired any rights under the ordinance of 1787, and consequently the instructions asked by the plaintiff in error should have been given.

Judgment reversed and cause remanded.

TOMPKINS, J.

Whether the laws of Canada permitted slavery there, is a fact for a jury to find, and not for the circuit court of St. Louis to decide; these laws, if there be such, being foreign laws.

ALEXANDER HAMILTON, ADM'R OF HUGH O'NEIL VS. MARY O'NEIL.

1. A widow is entitled to dower under the 1st section of the act concerning dower, R. C. 1835, p. 228, unless she elect to take under the 3rd section of same act. Her right is absolute until divested by election.
2. It is not necessary that a widow should file a renunciation as provided in 10th sect. of the above named act, except in cases in which real estate has been devised to her, to entitle her to be endowed under 1st sect.

ERROR to St. Louis Circuit Court.

ALEXANDER HAMILTON, *in person*.

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POINTS AND AUTHORITIES.

1. The widow in this case takes, in the first instance, under the 3d section of the act concerning dower, R. L., 228, subject to the payment of debts.

The 12th section of article 6th of the administration law, R. L. p. 61, under which this motion was made, provides that "until the widow's dower be assigned, the court shall order such sums to be paid her, out of the hire of slaves, and the rent of real estate, as shall be in proportion to her *interest in slaves and real estate*." This section does not define this interest; but in effect it comports with what, under our legislation upon the subject, is the true and only meaning of "dower," which at least signifies nothing more nor less than that portion of the husband's estate to which, by law, the widow is entitled; whether it be given under that, or another, and different name. There being, then, in this instance, no devise of real estate to the widow, we refer at once to the statute of "Descents and Distributions," R. L. 222, the 1st section of which enacts, that when any person, having title to real estate, of inheritance, or personal estate undisposed of, shall die intestate as to such estate, it shall descend, and be distributed among his kindred, as is therein provided, subject to the payment of his debts and his widow's dower. As this statute is otherwise silent upon the subject, recourse must ultimately be had to the act concerning dower, for the purpose of fixing and ascertaining what is "that portion of the husband's estate to which, by law, the widow is entitled." We find in the first place, that under this statute, this is a case of election, which, however, not having been made, the simple question recurs: what portion of the estate left by the husband, is assigned to the widow independently of that which might otherwise, by election, have been acquired?

It is obvious from the slightest examination of the law, that the Legislature has enumerated two classes of widows, for each of whom distinct specific provision is made, assigning to each, in the first instance, rights differing essentially in value and extent. The first comprehends widows upon whom, by the circumstance of the death of the husband, have been thrown the burden and responsibility of maintaining and educating the children of the deceased. The second embraces those cases in which no such charge and duty exists, there being no children. The discrimination thus made, on examination, will be found to be based upon highly moral and equitable considerations. To the first is given

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one-third, and for life only, but free of debts, thus recognizing and providing, as well for the rights of the children, as for the probable necessities of the widow, in supporting and educating them; reserving to the children their right of inheritance, yet preferring the widow to the claims of creditors. To the second is allotted all the real and personal estate which came to the husband in right of the marriage, remaining undisposed of, absolutely, and one-half of the real and personal estate belonging to the husband at the time of his death, also to be enjoyed absolutely, thus presenting a like two-fold consideration, that as there are no children to be affected by such a division, the widow's share should be larger, that it shall be held absolutely; yet for the same reason, there being no children to provide for, she should take subject to the creditors of her husband. It therefore requires in such a case as this, an election by the widow within the time, and in the manner prescribed by the 6th section of the act to enable her to change this specified provision into a share of one-third, under the first section.

Our past legislation upon this subject will furnish some aid in the interpretation of this Statute. Heretofore and until the act of 1825, this matter was found under the more appropriate heading of "wills, descents and distributions." Regardless of names under statutes of this general character, the legislature proceeded directly to a division of the intestate's estate, first specifying the shares of widows, instead of leaving that subject to be disposed of by a separate and distinct enactment, under the name of "dower." The primary division of a third, and a half, as dependent upon the circumstance of there being or not being children, is preserved throughout. It was not until the act of 1825, that an attempt was made to separate the law of dower from that of descents and distributions. But although they exist by different titles, yet the two subjects are so intimately blended, that a reference from the one statute to the other, becomes necessary, and they virtually stand as of old, as if they were both embraced under the provisions of one general law of "wills, descents and distributions."—If then these statutes, now apparently distinct, were consolidated into one general law, it is believed there could be but little pretence of question as to what share was allotted to the petitioner. It will be perceived, that precisely the same provision was made for the widow, without children, under the act of 1825, as is given under the act of 1835. But by the former statute, both interests were made subject to the payment of the husband's debts; the legislature uniformly holding to their favorite policy of making every thing subject to the payment of debts. This policy was so far released by the act of 1835, as to

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release from debts the interest of the widow, where there are children, but only in that instance, and for the obvious reasons already mentioned. If this question arise under the act of 1825, there could be no doubt, and yet as has been shown, it is the same law with regard to the widow without children, as now exists, excepting only that under the former law, there was no obligation to elect. Insert that clause in the act of 1825, and would it alter the case, as to what specific proportion was given in the first instance? And but for the existence of that clause in the act of 1835, it might well be contended that the widow would take, not only under the 3d section, of the estate which was left, but also her dower under the first section, in all lands of which the husband was seized, and which he had conveyed during coverture, to which she had not relinquished her dower, whatever might be the condition of the estate, whether solvent or insolvent, and that this clause was intended to prevent her so doing.

It is from the use of the word "dower" in our legislation, that much of the confusion and uncertainty connected with this question arises. We retain the name, and are apt to draw indistinct analogies from the principles of the common law, upon the subject of dower, long after the system itself has ceased to exist among us. Our law bears but a slight resemblance to the common law dower; it is so modified and enlarged as to embrace not only trust estates, and lease-hold property of certain descriptions, but a portion of the personalty, and differs also in other essentials.

The literal construction given to the words of the first section, "every widow shall be endowed of the third part," proves too much. It conflicts with the provisions of the 9th and 10th sections, which provide for an election by the widow, between the bounty of her husband, and what the law has given to her. And according to that interpretation it would be impossible to endow a widow, under the 3d section. Again, in the event of an election to take under the 3d section, and the ultimate insolvency of the estate, clearly she would be entitled to nothing, unless indeed it should be held that an election under such circumstances, would not be operative. Again, this expression may be regarded as a legislative declaration, that every widow whether alien or not, and every such person for whom no testamentary provision may have been made, where a will exists (treating this latter instance in connexion with the estate of wills, as one of intestacy) shall be endowed. These and other considerations which suggest themselves, supply full efficacy and meaning to this peculiar phraseology, and no doubt led to

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its adoption. The petitioner's claim, therefore, derives no support from this language.

We contend then that this is a distinct distributive share of the estate given to the widow in lieu of dower, and that she can take under the first section by her voluntary election only in the manner prescribed by the act. The act of January 25th, 1817, gave to the widow with children, dower of one-third, while in the other case, it declared that she should be "*entitled as her dower,*" to one-half. The act of 1835 aims at the same thing, that is to say, a *provision as*, or in *lieu* of dower, but with the privilege of electing to take the latter. This mode of distributing an estate is not novel; see a similar statute of South Carolina; Griffith's Law Register, title, South Carolina, 852.

Another view of this matter would seem to be irresistible. The Statute of wills, p. 617, saves to the widow the right of dower in the estate of the husband, real, *personal*, and mixed. The Statute of descents and distributions, in cases of intestacy, does the same thing.—That therefore cannot be a rational exposition of the will of the Legislature, which in distributing an estate starts out with cutting off that right, thus positively established, or at most recognizes it but indistinctly, by placing it upon the inferior footing of an interest dependent upon a contingency of the most precarious description,—a due observance by the widow of the solemnities required by the act, to constitute an election. *Where then do we find the interest or dower of the widow, without children, in the personalty?* Not in the first section of the dower act, for that relates to *real estate* only. Not in the 2d section, for that is confined to a case *where there are children*. Thus far then the legislature after having expressly saved this right, have not only failed in their primary division of the estate, to provide for it, but in effect, so far as the widow is concerned, have preferred the remote kindred of the husband, by passing to them all the personal property. *It is in the third section alone*, that the interest or dower of the petitioner, in the personal property is mentioned and defined; and it is therefore to that section (and certainly not to that which omits to notice it at all,) that we must look, in the absence of an election, to ascertain her rights. It became the plain duty of the legislature, thus having saved to widows their dower in personalty as well as real estate, to state in distinct terms what that interest should be. This they have done, and to contend that no such interest passes, *except that which may be acquired by election*, would be to reduce to a mere contingency, that which it had already, by a previous enactment, become absolutely necessary to fix and prescribe positively and definitively in the first instance;

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but which being once established may very well be made to consist with the incidental right of voluntarily taking something else and different. It is in effect saying that the legislature from no conceivable motive, but in opposition to all proper considerations have provided that the widow without children, might take the whole of her dower in the real and personal property, provided she elect so to do, but that failing to make such election, she may take a portion, that is, be confined to the realty alone. This would be inverting the order of things. An election in lieu of dower, necessarily supposes the previous ascertainment of dower itself. The act itself furnishes an illustration of the intention, as well as the ability on the part of the legislature, in plain and distinct terms, to provide a *substitute* for dower, as may be seen in the 3d sub-division of the 3d section where an election (indefinite however, as to time,) is given to the widow with children by a *former marriage* to take certain property, real and personal. But her dower in both kinds of property had already been fixed by the 1st and 2d sections. This right of election is "*in lieu of dower*," thus settled and is so expressed.

2. Here was a large bequest of household furniture and other personal property, but no declaration of non-acceptance by the widow, as required by the 10th section of the act. Here again is a peculiar feature in our law, which makes personalty, a part of the wife's dower. It is admitted that the apparent intention of this part of the act, is to deprive the widow of dower in any lands devised by will, where, under that will, she takes an interest in lands as devisee. But the 10th section on examination will be found broad enough to include under the word "provisions," a case in which personalty alone is given. The utmost that can be contended for is that the legislature designed securing so far as was practicable, a competent or suitable provision for widows. It is unquestionable that in many instances, this can be done quite as effectually, and sometimes much more so, by a testamentary provision in personalty, or by devising an estate in lands. Should the provision be deemed inadequate or precarious, the widow has simply to decline it, to ascertain which fact, an ample opportunity is given her. Suppose then the case of a bequest of personalty, in a large amount, far exceeding the distributive share of the widow, perhaps two-thirds of the estate in value, and that this be accepted by her. Could it be said that thus she was unprovided for, that this was a case of intestacy, as to her, within the meaning of the act? We hold not. So long as the statute includes personalty within the dower, and makes no distinction between the descent of real and personal property, that would not seem to be a reasonable construction of this part of the act, which confines its operation to

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real estate: the effect of which view is not to exclude the widow from dower in such real estate, as had been conveyed by the husband during coverture, and to which she had not relinquished her right, but to deny her any participation in such estate as may be left at the time of his decease. See 2d Dig. Equity Reports 338, under a similar statute.

GAMBLE & BATES, for defendant in error.

POINTS AND AUTHORITIES.

1. That the 1st section of the law of dower, Revised Code, 228, establishes the general rule, that a widow is to be endowed of one-third of the real estate for her life.
2. That the 3rd section of that law is in the nature of an exception.
3. That if a widow fails to make any election under the 5th and 6th sections of the law of dower, she must be endowed under the 1st section.
4. That the bequest in O'Neil's will of furniture in lieu of the \$150 allowed to the widow by law, has no effect upon her claim for dower in the real estate.
5. If the widow does not elect, and there is no provision in regard to the consequence, is not the act to be construed, as if the clause about election was not in the statute?

SCOTT, J., delivered the opinion of the court.

This was a proceeding instituted by motion in the probate court of St. Louis county, in the name of Mary O'Neil, widow of Hugh O'Neil, deceased, for the recovery of a portion of the rent of the real estate of said H. O'Neil, under the 12th section of the 6th article of the act respecting executors and administrators, which directs that until a widow's dower is assigned, the court shall order such sum to be paid to her out of the hire of slaves, and rent of real estate, as shall be in proportion to her interest in the slaves and real estate. It appears that Hugh O'Neil died seized of real estate without a child or other descendant leaving a will by which he bequeathed to his wife all his household furniture and personal property, on the premises occupied by him at the date of his will, in lieu of the sum of \$150 to which she would otherwise be by law entitled. Mary O'Neil made no election, whether she would take under the first or the third section of the act

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concerning dower, nor did she file any renunciation of the provision made for her in the will of her husband. On hearing the motion, the probate court ordered the administrator with the will annexed, to pay over one-third of the rents of the real estate to the widow Mary O'Neil. From this order an appeal was taken to the circuit court, where it was affirmed, and the cause is now brought to this court.

The question submitted for determination, is, whether Mary O'Neil, the widow, having made no election, is entitled to any dower, and if entitled, under which section of the act respecting dower, shall it be assigned?

Let it be borne in mind, that the first section of the act concerning dower, is general in its terms and applies to the widows of all husbands whatsoever, without regard to circumstances; and the first clause of it, except so far as it relates to uses, is declaratory of the common law. The words are, that *every widow shall be endowed*. If legislation had ceased here, every widow would have been provided for, none could have complained that they were overlooked. The third section on the other hand is partial in its terms, it provides for a particular class of cases, and does not enact that the widow of every such husband shall be *endowed*, but shall be *entitled* &c. Had no other provision been made, than is contained in this section, most widows would have been left without dower or any thing in lieu of it.

Because the common law respecting dower has been changed in some particulars, it cannot therefore be maintained that the whole system in relation to that subject is repealed. The common law being the substratum of all our laws, its rules prevail unless repealed expressly, or by necessary implication. If the rules of the common law be applied in determining which of the two sections, above referred to, shall give dower, no question can be left on the mind. By the common law, dower is a title inchoate from the date of the marriage, and becomes consummate by the death of the husband. It is an interest which attaches on the land as soon as there is the concurrence of marriage and seizen. 4 Kent, 50; Cruise, tit. Dower; Coke, Lit. Now if dower is an inchoate title, and has its existence from the concurrence of marriage and seizen, it can have no relation to the 3rd section of the act, because when the marriage is solemnized, if there be a seizen at that time, it cannot be ascertained whether the circumstances will ever arise under which it can attach. This objection does not apply to the first section of the act. It would seem then to follow, that this section was designed to give dower, and the third was intended under certain circumstances as a substitute to it, to entitle a widow to which, it was neces-

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sary that she should have declared an election to take it. The doctrine is, that when an election creates the interest, nothing will pass until an election is made; and if no election can be made, no interest will arise. 1 Coke, Lit. 523. United States vs. Grundy & Thornburgh, 3 Cranch. 337. There being then no interest under the 3rd section, previous to an election, and no election having been made within the time prescribed by law, none could afterwards arise. But if an interest existed under the first section, previous to any election, as it has been endeavored to be shown, and as that interest would still continue, until it was divested by an election lawfully made, it must follow, that that section gives the rule by which the rights of the defendant in error are to be ascertained and determined.

As to the objection, that the widow not having filed a renunciation of the provision made for her by the will of her husband, in accordance with the 10th section of the act concerning dower, she is not therefore entitled to be endowed; it can only be necessary to observe that the 10th section and the one preceding it, only relate to devises of real estate, and the provision made for the wife by the will, being only of personal estate, she was under no obligation to renounce that provision, in order to entitle her to dower in the real estate.

Judgment affirmed.

SIMON DARNE vs. MARGARET BROADWATER.

1. An improper refusal to grant a continuance is error, and is available as well where a non-suit is taken, as where a trial is had.
2. A witness residing eighteen miles from the place of trial was summoned on the 11th. The cause was set for trial on the 13th, but not tried until the 15th. Held, that this was due diligence.

APPEAL from Callaway Circuit Court.

DAVID TODD, *for Appellant.*

POINTS AND AUTHORITIES.

The appellant insists :

1. That an inferior court must exercise sound legal discretion in matters of continuance, and such opinion is revisable by this court.

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2. That reasonable diligence was used by the party, to procure the attendance of the witness by a summons five days before trial, for a witness in the same county but eighteen miles from the place of trial.

3. That after a witness is summoned, that he should be waited upon by the party, and a promise is made to attend under the summons, is more than reasonable diligence, and of itself should entitle the party to a continuance. 1 Mo. Rep. 501; 3 ib. 21; 3 ib. 90; 6 ib. 444.

LEONARD, *for Appellee.*

POINTS AND AUTHORITIES.

1. The refusal of the circuit court to allow the plaintiff a continuance of his cause, cannot be assigned for error, when the plaintiff upon such refusal voluntarily suffers a non-suit.

In all the cases in this court where judgments have been reversed on account of the refusal of a continuance, there were trials, and verdicts and final judgments against the party complaining. *McLane vs. Harris*, 1 Mo. Rep. 501; *Riggs vs. Fenton*, 3 Mo. R. 28; *Porter vs. McCullough*, 6 Mo. R. 444.

2. The affidavit does not shew due diligence on the part of the plaintiff, in endeavoring to procure the attendance of his witness. *Greenleaf's evidence*. 363; *Hammond vs. Stuart*, 1 Strange, 510; *Mason vs. Henderson*, 3 Monroe Rep., 293.

NAPTON, J., *delivered the opinion of the court.*

This was an action of assumpsit instituted in the Callaway circuit court, the writ being returnable to the October term, 1843, of that court. Issue was taken at that term, and the cause stood continued for the April term, 1844, and was set for trial on the 6th day of that term, which was 13th April. The case was not reached until Monday the 15th day of April, when the plaintiff moved for a continuance. The motion being overruled, the plaintiff took a non-suit, and moved to set it aside, which being overruled, the plaintiff excepted, and the only matter of error assigned in this court is the refusal of the circuit court to grant the continuance.

The motion for a continuance was supported by the affidavit of the plaintiff, which stated that Dr. James Saunders was a material witness; that the facts expected to be proved by him, could not be proved by any

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other witness; that the witness was duly summoned; that the affiant called on the witness on the day preceding the day of trial, who admitted that he had been summoned and promised to attend; that the cause of the witness's absence was unknown to affiant, and was not by his connivance, &c. The subpoena was issued on the 8th April, and served on the 11th. It appeared that the witness lived eighteen miles from the place of trial. The case was set for trial on the 13th, but did not in fact take place until the 15th.

The only objection urged to the sufficiency of the facts proved to show due diligence on the part of the plaintiff, is that the subpoena was not served in time to enable the witness to put his affairs in order, and travel to the place of trial. We are unable to see the force of this objection, and if it were entitled to any weight it would seem that the extraordinary diligence of the plaintiff in calling on the witness the day before the trial, and procuring his promise to attend, without any objection by the witness on account of time, would be sufficient to obviate its force.

The refusal to grant a continuance is a matter of error, as has been repeatedly adjudged by this court; and though it has been suggested that these adjudications have been made in cases where a trial was had, no good reason is perceived why the principle is not equally applicable to cases where a non-suit is submitted to, and the consequent expense of a useless investigation saved to the parties.

Judgment of the circuit court will be reversed and the cause remanded for trial.

RAYMOND vs. JEWELL.

1. A, by deed, conveyed a tract of land to B. By a postscript thereto, A bound himself to deliver possession on a specified day, and further agreed that in the event of a failure so to deliver possession, B requesting it, he would pay all damages, &c., sustained by such failure. Held, that in ejectment brought by B, it was not necessary to show a request, but that the last agreement, did not affect the agreement to deliver possession.
2. A bond from B to H, by which B agreed to convey the land to H, on payment of a stipulated sum, on a certain day, providing that if the money were not paid on the day fixed, the bond should be void, and giving to H possession until a failure to pay the purchase money. Held, not sufficient to establish an outstanding title in H, without proof of payment at the day fixed.

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APPEAL from Boone Circuit Court.

HAYDEN *for Appellant.*

POINTS AND AUTHORITIES.

The appellant by his counsel, will rely upon the following points and authorities in this court, to reverse the judgment of the circuit court.

1. That the deed of conveyance from Raymond and wife, to plaintiff, for the land sued for, upon its face shows that the defendant was not bound to deliver up the possession of the land, until requested so to do by plaintiff; and that there is no evidence in the cause showing such request of defendant by the plaintiff, prior to the institution of this suit.

2. That by the deed from the defendant to plaintiff, the defendant covenanted with plaintiff that in lieu of the possession of the land, plaintiff was to accept, as satisfaction for the non-delivery thereof to the plaintiff *upon request*, damages commensurate with the injury that plaintiff might sustain on account thereof, and the plaintiff hath given no evidence that the defendant failed to comply with his contract *upon request* to perform it, in this particular.

3. That the deed of bargain with Hadwin, to sell and convey the land, and thereby delivering the possession of the land to Hadwin, subsequent to the sale thereof by defendant to plaintiff, was evidence conducing to show that Hadwin had a right to the possession of the land, and not the plaintiff, and therefore ought to have been received and considered as evidence, and not excluded by the court in deciding the cause, in the absence of proof conducing to show that Hadwin had forfeited his right to the possession of the land under said deed.

4. That the court erred in sustaining the motion of the plaintiff, to exclude defendant's evidence, as well as overruling the motion of defendant for a new trial, and in arrest of judgment, for the reasons therein stated.

LEONARD & GORDON, *for Appellee.*

POINTS AND AUTHORITIES.

1. The outstanding right in Hadwin to the possession, terminated on the first day of January, 1842, if he failed on that day to pay the purchase money: Wright vs. Moore, 21, Wend. Reports 230.

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2. The burthen of proving the payment of the purchase money on the day appointed, was on the defendant, and upon his failure to prove it, the paper writing was properly disregarded: Greenleaf's Evidence, 265.

NAPTON, J., *delivered the opinion of the court.*

This was an action of ejectment in the Boone circuit court, instituted by Jewell against the appellant, to recover the possession of a lot of ground in the town of Rocheport.

The case was submitted to the court.

The appellee gave in evidence a deed for the land in dispute, from Raymond and wife to himself, to which was annexed a postscript, containing an agreement to deliver possession of the premises to the appellee on the 1st of December, 1840, and in the event of their failure so to do, the said Jewell requiring the possession, they agreed to pay such damages, &c., as might be sustained in consequence thereof. The appellee also proved possession of the premises in Raymond and wife, from the date of the deed, to the time of instituting the suit; and also gave evidence of the value of the rents and profits.

The appellant on his part, offered in evidence an agreement between Jewell and one Hadwin, executed in January, 1841, covenanting to convey to said Hadwin the land in controversy, upon the payment of a stipulated price, on or before the first of January, 1842, but stipulating that if the money was not paid on the day mentioned, the deed was to be void. By the terms of this agreement, Hadwin was to have possession of the land, until his failure to pay the purchase money, on the day fixed in the contract.

Upon this evidence the court was called upon to disregard the deed from Jewell to Hadwin as being insufficient to show an outstanding title; and the court being of this opinion, the appellant excepted and brings the case here by appeal.

Two errors are assigned. The first is, that the court erred in giving judgment for the appellee, when there was no proof of any demand made by the appellant for the delivery of the possession. This objection seems to be based upon the supposition that the agreement of Raymond to pay damages for failing to deliver the possession when required, had the effect of controlling and annulling the covenant which immediately preceded it, and which required the delivery of the premises on a specified day. But the covenant to deliver possession on the 1st De-

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ember, 1840, we consider as specific and unaffected by the agreement to pay damages; and the latter may be construed to embrace only such special damages, over and above the rents and profits, as might be sustained by the failure of the appellant to deliver possession when demanded.

The second error assigned is the exclusion of the deed from Jewell to Hadwin. The bond was a conditional agreement to convey to Hadwin, on a day specified. There was no proof offered that Hadwin had ever complied with the condition, and of course such a deed could not show an outstanding title.

Judgment affirmed.

HILL & RAYMOND vs. JEWELL,

The facts of this case being similar to the preceding, the same order is made.

BOONE COUNTY vs. JAMES S. LOWRY.

1. An officer cannot contradict the return of a writ made by him. A special return of facts shewing that he has discharged his duty will protect him. But in actions against him he will be confined to the facts stated in his return, and cannot shew another and different state of facts in his defence.

ERROR to Boone Circuit Court.

TODD AND GORDON *for Plaintiff in error.*

POINTS AND AUTHORITIES.

The plaintiff insists to reverse the judgment :

1. That the officer is estopped by his return, and no evidence can be given by him to shew property levied on by him as debtors property belongs to a stranger. 5 Wend. Rep. 207; 2 J. J. Marshall, 26; 3 Marshall Rep. 412-393; 1 Litt. R. 17; 3 Litt. R. 41; 1 J. J. Marshall, 12; 6 Mass. R. 325; 15 Mass. R. 83; 9 Mass. R. 388; 3 Monroe R. 351; 2 Hen. and Menf. 105; 1 Litt. Rep. 16.

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2. That the interest of a pawnee, pledgor, or one having the general property in goods, can be sold by execution. 2. B. Monroe's Rep. 41; 10 Wend. R. 318; 4 Wend. R. 292; 2 Bacon, 715.

KIRTLEY, *for Defendant in error.*

POINTS AND AUTHORITIES.

1. The defendant's counsel will insist that the evidence given on defendant's part, was competent and proper.

It was competent and tended to show that the corn never was Burch's. It never had been in his possession. The purchase was conditional and without, and until the purchase money was paid, his right to the corn or even the possession of it, did not vest. Burch, also, as we insist, had a clear right to pledge the boat, and put it into Pettus' possession, and beyond his own control to secure that payment.

The constable could not rightfully divest Pettus of that possession, and certainly none to compel him to part with his own corn, upon other terms than those of his own making. It could not rightly be said the plaintiff was injured, in legal contemplation, because the constable had failed to sell Hunt's or Pettus's property, to pay Burch's debt. In other words it could be no legal injury to the plaintiff, that the constable did not continue a trespasser, because he began by being one, to the rights of strangers to the execution. Fuller vs. Holden, in 4 Mass. R., 498-502, decided by Chief Justice Parsons, fully sustains this position. See also statute concerning executions, Revision 1834, § 18 and 43. King vs. Bailey, 1 semi-annual part vol. 8, Mo. R, 332.

2. Upon the basis of the foregoing proposition, the instructions given embrace the law of the case, and those asked by plaintiff's counsel were properly refused.

NAPTON, J., *delivered the opinion of the court.*

This was a suit upon the official bond of Lowry, as constable of Missouri township in Boone county. Several breaches are assigned, and among others, that the defendant levied on certain property of the defendant, but failed and neglected to make sale of the property so taken, according to law.

Upon the trial, the plaintiff proved a judgment against W. S. Burch and R. N. Todd, for debt, damages and costs, an execution issued thereon, and the following return: "Levied this execution on one boat and

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load of corn, supposed to be one hundred and thirty or forty barrels of corn, shown to me as the property of W. S. Burch by R. L. Todd, the son of R. N. Todd, this 7th March, 1840, and on the 8th March, 1840, Stephen Pettus became the claimant of the corn and boat, and demanded a jury. I then summoned Stephen Pettus, Sandy Johnson, Thomas Jefferson and Isaac Bledsoe, jr., as a guard to guard said boat and corn, till I could get back with a jury, and when I got back to the place where I left the boat and corn, it was gone, and said guard was gone, this 9th March, 1840. Returned not satisfied. No other goods and chattels found whereon to levy in Missouri township. This 21st April, 1840.

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The defendant then offered evidence to prove that the boat and corn did not belong to W. S. Burch at the time of the levy. This evidence though objected to, was admitted by the court, and the court instructed the jury that if the property mentioned in the constable's return as levied on, was not, at the time of such levy, the property of Burch, they must find for the defendant. To this instruction, as well as to the admission of the testimony on which it was based, exceptions were taken. The plaintiff submitted to a non-suit, and moved to set it aside, because the court had admitted illegal evidence and had given illegal instructions. The motion being overruled, the case is brought here by appeal.

The on'y question is, whether the evidence tending to show that the property levied on was not the property of the defendant in the execution, was admissible.

It seems to be conceded as a general and well established rule of law, that the officer cannot contradict his returns. A special return of the facts will always protect the officer, if the facts so returned shew that he has discharged his duty. In the present case the return is a special one, and must be taken to embrace a statement of all the facts upon which he relied for a justification of his official conduct. Is the fact, that the defendant was not the owner of the goods levied on, one of the facts detailed in the return, or can it be inferred from its language? In other words, is it a return of *nulla bona*, or a special return of facts, which amount to a return of *nulla bona*? If so, the officer is clearly not liable. For if he levies on property which he afterwards discovers, either by the verdict of a jury, or by any other sources of information, to be the property of a stranger, the law does not require him to commit a trespass, or to commit a second trespass because he has ignorantly been guilty of the first.

The return of the constable is, that he levied on property shown to

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him as the property of the defendant; that the property was claimed by a stranger, and that whilst engaged in summoning a jury to try the right of property, it was rescued from the possession of those to whom he had entrusted it.

Here is a return of a levy, and a levy upon property which appears amply sufficient to satisfy the judgment. This property was believed to be the property of the defendant, and the only reason suggested by the return, for not selling in pursuance of the levy, is the rescue. This execution of the plaintiff is discharged in point of law. *Ladd vs. Blunt*, 4 Mass. Rep. 402. *Bailey vs. French*, 2 Pick. R. 586. Suppose the officer, in executing a *capias ad satisfaciendum*, returns a rescue, and in an action for his misconduct, he offers to prove that the defendant was privileged from arrest. The proof offered shows that the plaintiff has not been damnified, any more than the plaintiff in the present action has been injured by the negligence of the officer, in suffering the property levied on, to be rescued. But the return of the arrest has discharged the writ, and the effect of the proof is that there was no arrest. So in the present case, the effect of the evidence offered, is, that there was no levy, for a levy upon the goods of a stranger was illegal. So that at least, in order to let in the evidence given in the court below, we must hold the return to be a virtual return of *nulla bona*.

The case of *Fuller vs. Holden*, (4 Mass. R. 501,) though differing in many particulars from the present, is, certainly decided on grounds which if tenable, would fully justify the affirmance of this judgment. There may be peculiarities in the statutes of that State, which enabled that court to reconcile that opinion with what they subsequently held in *Gardner vs. Hosmer*, (6 Mass. R. 317.) In the last mentioned case, the principle is fully recognized, that an officer, in an action against him cannot be permitted to contradict his return. In the first case, the action was on the case for damages alledged to have been sustained by reason of a neglect of duty on the part of the officer, in failing to levy an execution upon property he had previously attached. The officer had returned to the final process, that the property attached had been rescued from his possession, and upon the trial he offered to prove that the property so attached, was in fact the property of the persons who had rescued it. The evidence was rejected by the judge who tried the cause; but the supreme court declared in their opinion, reversing the judgment, that the defendant might prove that he had been guilty of no neglect, and that the proof he offered did show that he was in no default. The question in relation to the propriety of allowing the officer's re-

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turn to be contradicted, was not adverted to in the opinion of the court. The court virtually held, that the officer might admit in his return that he had been guilty of a neglect of duty, and still be permitted to show in evidence that in fact he was not guilty of any neglect prejudicial to the plaintiff in the execution. In other words, he was permitted to contradict his return.

The authority of the case of *Fuller vs. Holden* is very much weakened by the subsequent opinion of the same court in the case of *Gardner vs. Hosmer*. It is difficult to see why the rule of law adopted in this last case, was not applicable to the facts which existed in both the cases.

Suppose the officer in the case now before this court, had returned that he had levied on certain property of the defendant in the execution, and that before a sale, it had been taken from his possession.—Would the admissibility of the evidence showing that the property belonged to a stranger, be any more objectionable than under the return as it now stands? We think not. The ground assumed by the court of Massachusetts, is, that the defendant may give in evidence facts which show that the plaintiff has not been damnified, and if the property levied on, does not in truth belong to the defendant in the execution, the plaintiff has not been damnified any more where the officer returns his execution as having been levied on the property of the defendant, than when he returns, that he has levied on property *shown* to him as the property of the defendant. The form of the return can make no difference, if the principle of the case of *Fuller vs. Holden* be a true one, and the liability of the officer is to be settled, not by his return, but by the facts of injury or no injury to the plaintiff in the execution.

But this is not the proper criterion. The officer should make a legal return, or if he prefers a statement of facts, he must state all the facts on which he relies. He cannot be suffered, either on principle of law or sound views of public policy, to put the plaintiff off his guard by a partial return of the facts, inducing a belief that the officer is responsible, and afterwards come in and show another and different state of facts, which had they been stated in the return would have exonerated him from all responsibility.

Judgment reversed and cause remanded.

See vs. Bobst.

SEE vs. BOBST.

1. It is error in the circuit court to allow amendments to be made, except upon terms not prejudicial to the rights of parties.

APPEAL from Montgomery Circuit Court.

NAPTON, J., *delivered the opinion of the court.*

This was an action of forcible entry and detainer, originally brought before a justice of the peace by Bobst against See. A judgment by default was entered by the justice against See, and from that judgment See appealed to the circuit court.

The appeal was dismissed by the circuit court, and the case was brought to this court. In the opinion of this court, as may be seen by reference to it in 8 Mo. R. p. 506, there had been in fact no judgment by default properly taken before the justice, the defendant not having been served with process, and the cause was therefore remanded to the circuit court for trial upon its merits.

The circuit court, as it appears from the record now brought up, at the instance of the appellee, permitted the constable to amend his return, and the return having been amended, the court then dismissed the appeal.

The amended return reads thus: "Executed the within summons by leaving a copy of the same, together with a copy of the original complaint, at the usual place of abode of the defendant, Adam See, in Montgomery county, in the presence of a white member of his family, over the age of fourteen years, &c., &c."

Passing by the objection to the amended return, we are of opinion that the court erred in allowing the amendment, and dismissing the appeal.

The general authority of the circuit court to allow its process to be amended so as to conform to the facts, is unquestionable. Where such amendments are permitted upon terms not prejudicial to the rights of either party, they are in furtherance of justice, and therefore unobjectionable. In the present case the appellant had a legal advantage which enabled him to obtain a trial upon the merits; and the appellee ought not to be permitted to deprive him of this position and assume the vantage ground himself with a view to turn his adversary out of court upon a technicality.

Newman vs. T. & L. A. Labeaume.

The omission to make provision for setting aside a judgment by default in the action of forcible entry and detainer, was no doubt an oversight. Whether the silence of the statute is to be construed as making a judgment by default forever obligatory, and beyond the control of the justice, as well as the appellate courts, or whether the courts would undertake to regulate the proceedings in forcible entry and detainer by analogy to the other actions in justices courts and allow the motion to be set aside, though not expressly given by statute, is no wise material in this case to determine; sickness, high waters, and a hundred casualties beyond the control of human foresight, may prevent a party defendant from being present at a return day before the justice. It would be productive of monstrous injustice, if in such cases the judgment by default which the justice must enter, should be beyond the reach of the justice himself, and of all superior tribunals. Upon this point, however, no opinion is given, for it does not arise in this case.

Judgment reversed and cause remanded.

NEWMAN vs. T. & L. A. LABEAUME.

1. An award made on a submission under the act of 1835, concerning arbitrations, is incomplete until signed by the arbitrators, and attested by a subscribing witness. Until this is done, its delivery to the parties is nugatory. It may at any time after, be done. The attestation of the witness may be made on the return of the award, by the order of the court.
2. Errors of law, or incorrect conclusions as to facts, are not sufficient to set aside an award. There must be under our statute, corruption, partiality, or some misconduct of the arbitrators calculated to prejudice the rights of the parties.

APPEAL from St. Louis Circuit Court.

SPALDING & TIFFANY, *for Plaintiff in Error.*

POINTS AND AUTHORITIES.

I. Judgment should not have been entered on the award, because there were no subscribing witnesses, as required by statute. Revised Code, 71, § 6.

1. The award was complete, and the office and character of the arbitrators had terminated when the witnesses signed. Watson on arbitration, 83 (9 Law Library.) 3 Greenleaf R. 85; 6 Easts R. 309; 4 Easts

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R. 584; 8 Easts R. 54; Hardin's R. 227; 2 Littell's R. 54; 1 Coxe R. 144; 1 Coxe R. 435.

2. The proper oath was not taken by the arbitrators.

II. The award should be vacated. 1st, for the partiality of Chadwick, one of the arbitrators. 17 John. R. 410-417. See Revised Code. 2nd, for the refusal to hear evidence as to S. B. Howard, and from books. 5 Mun. R. 10; see also revised Code. 3rd, for refusal to have the books produced; for though afterwards the arbitrators looked into them, Newman did not have access to them, and L's affidavits do not deny Newman's statements. 4th, because Chadwick looked at the books and papers produced by Labeaume privately, after arbitration commenced. 5th, because they go into the consideration of the charge of Newman that stock was charged to him at higher price than to Labeaume. 6th, because arbitrators exceeded their authority, to-wit: in allowing charge of Labeaume's for settling up the concern, when this was not in the specifications.

GAMBLE AND BATES, *for Defendant in error.*

NAPTON, J., *delivered the opinion of the court.*

During the pendency of an action of assumpsit in the St. Louis court of common pleas, brought by Messrs. Labeaume against Newman, the parties entered into an agreement under their hands and seals to submit that matter, and all matters in relation to a co-partnership formerly existing between them, and all other matters in difference between them, to the arbitration of three persons, to wit: Seth A. Ranlett, Alfred Chadwick and Joseph Ridgway. The two former were chosen by the parties respectively, and the latter selected by the two first. By the articles of submission, the award was to be made on or before the 15th April, 1843, and was agreed to be entered as a judgment of the St. Louis circuit court. Each party was required to furnish a bill of items to the opposite party, and the arbitrators were not to take into consideration any items not included in such bills. An award was accordingly made on the 27th March, 1843, and drawn up in duplicate, and signed and sealed by all the arbitrators, requiring Newman to pay a sum of money to the Labeaumes. One copy was delivered to the Messrs. Labeaume, and the other to Newman. On discovery that the law required the award to be attested by subscribing witnesses, the copy of the award given to Newman was procured from him, without informing him of the purpose for which possession of it was desired. The copy handed to the Messrs Labeaume was also obtained, and each

copy was acknowledged by the arbitrators, in the presence of two subscribing witnesses, called in for that purpose, and after being thus attested, was re-delivered to the parties interested. All this took place on the same day. The award was then filed in court, and a motion made for judgment thereon. A cross motion was made by the appellant to vacate the award, for the following reasons :

1. Partiality in two of the arbitrators.
2. Misconduct in refusing to hear testimony offered by the appellant
3. Misconduct in refusing to order the production of certain books and papers, demanded by the appellant.
4. Misconduct of Chadwick in examining the books and papers of the appellees' *privately* after his appointment, and in coming to conclusions thereon before the meeting of the arbitrators.
5. Uncertainty of the award.
6. Because the arbitrators exceeded their powers and imperfectly executed them.

7. The allowance of five dollars per diem to the arbitrators.

In support of the motion to vacate the award, sundry affidavits were filed. The affidavit of Newman, after giving a history of the matters in difference between him and the Labeaumes, according to his understanding of them, alleges that Chadwick, one of the arbitrators, had previous to their meeting, had access to the books and papers of the partnership of T. Labeaume & Co., and had received private explanations from the said T. & L. A. Labeaume or one of them. Such at least, he states, was the inference he drew, from the acquaintance manifested by said Chadwick with these books and papers from the commencement of the arbitration, and his facility in comprehending the explanations given by the said T. & L. A. Labeaume. The affiant further stated, that during the progress of the arbitration, the said Chadwick manifested petulance and irritation, when objections were made, or evidence offered by the affiant, and refused to hear testimony, which he said would impeach the integrity of the said T. & L. A. Labeaume. The affiant therefore believed the said Chadwick to be prejudiced against him. The affidavit further states that the affiant offered to produce evidence to show the dividends of the steamboat Howard, formerly belonging to the partnership, and to show what sums of money were received of said partnership from the proceeds of said boat, evidence which the affiant believed to be essential to his interests, but which the arbitrators refused to admit. The affiant also declared, that he had called for the production of the books and papers of the new firm of T. Labeaume & Co., (of which he was not a member,) expect-

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ing to show by said books, that the new firm had received moneys, notes, &c., on account of the old firm, and not credited to said old firm, but the said T. & L. A. Labeaume refused to produce them, and the arbitrators refused to order their production, and the said affiant had no opportunity of examining them during the arbitration. The affidavit further states, that in order to ascertain the amount of freight properly chargeable on certain goods purchased in Philadelphia by T. Labeaume, to the affiant, the affiant required the production of the bills of lading, alleging them to be in possession of the said Labeaumes; but said Chadwick, arbitrator as aforesaid, declared it was unnecessary, and said bills of lading were not produced. The affiant objected to sundry items allowed said Labeaume, in the settlement by the arbitrators, and objected to the allowance made to the arbitrators for their services, &c.

The affidavit of Jonathan Jones stated, that the affiant thought that during the whole arbitration, Chadwick seemed to be rather the advocate of the said T. & L. A. Labeaume, than one of the arbitrators; that from the acquaintance manifested by said Chadwick with the books of the old partnership of T. L. & Co., and his readiness in comprehending the explanations of the Messrs. L., he inferred that said Chadwick had made a previous examination of the books, and had received explanations from the Messrs. Labeaume, or one of them, or their clerk. The affiant further stated that the account of the steamboat Howard, as kept in the books of said partnership was complicated, and that no definite result could be ascertained without long examination, and explanations from the book-keeper; yet from the commencement of the investigation said Chadwick seemed very well acquainted with the said account, and with the manner in which T. & L. A. Labeaume explained said account. Said Chadwick also, in the opinion of the affiant, seemed to be irritated and excited when any claim was advanced by Mr. Newman, which said Chadwick thought, if allowed, would impeach the character of the said Labeaumes. The affiant also stated that the arbitrators refused to cause the books of the new firm of T. L. & Co., to be produced.

The affidavit of John R. Shepley, is confined to the conduct of Chadwick and the other arbitrators, and in substance agrees with the statement of Newman and Jones, on this head.

The counter affidavits in support of the award, were those of Ranlett, Ridgway and Chadwick.

Ranlett states, that he was selected by Newman, as an arbitrator, and that he and Chadwick, (the arbitrator chosen by the Labeaumes,) se-

lected Joseph Ridgway, and that Newman upon being advised of the selection, appeared well pleased; that the arbitrators commenced the investigation on the 16th March, 1843, and proceeded therein, in the presence of the parties; that the arbitrators neither rejected nor refused to receive any evidence offered by either party, unless upon a decision that it was irrelevant; that they had before them all the books of the old firm of T. L. & Co., that when Newman demanded the production of the books of the new firm of T. L. & Co., the Labeaumes at first refused to produce them, but afterwards they were produced, and both sets of books were constantly before the arbitrators, and they were fully examined. These books of the new firm were before the arbitrators after the second or third day, and the refusal to produce them at first, had no effect on the ultimate decision of the arbitrators. That the arbitrators had before them the ledger of the s. b. Howard, and the cash book produced by Mr. Newman, and everything that was necessary to a proper understanding of the affairs of the boat, and no evidence relative to the boat, necessary to an understanding of its affairs, was rejected, so far as the affiant recollected. All papers required by said Newman to be produced, were produced, except a certain bill of lading, which was lost, and the substance of which was sufficiently shown from memoranda furnished by Mr. Newman.

As to sundry items of the settlement complained of in the affidavit of Newman, the affiant gives an explanation, not material to be noticed here. The affiant stated that Mr. Chadwick, one of the arbitrators, was a man of quick and ready mind, intimately acquainted with book-keeping, and withal, somewhat irritable, and although his temper was occasionally manifested during the investigation, the affiant believed he had an entire willingness to do justice to Mr. Newman; and in settling the final award, was willing to allow Mr. Newman every thing that could with propriety be claimed for him. The affiant concludes with expressing his entire satisfaction with the result, as being consonant to equity, &c.

The affidavit of Ridgway, another arbitrator, states, that he at first declined acting, but at the personal solicitation of Mr. Newman, he finally consented. He confirms the statement of Ranlett, in relation to the production of the books of the new firm of T. Labeaume & Co., and expresses about the same opinion in relation to Chadwick.

The affiant of Chadwick states, that "the affiant never examined the books which were submitted to the arbitrators, until after the arbitrators commenced their session, and so far as he recollects, never seen them before; that Mr. Newman frequently volunteered to converse with him

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on the subject of dispute between the parties, after his selection as an arbitrator, and gave the affiant his views on the subject; that the subject was also occasionally mentioned to him by one of the Messrs. Labeaume, but that his conversations with Mr. Newman were more frequent, more protracted and more in detail, and so far as the affiant had any knowledge of the matter in dispute between the parties, previous to their sittings, as arbitrators, that knowledge was chiefly derived from the conversations of Mr. Newman." His affidavit in other respects corresponds with those of Ranlett and Ridgway.

The affidavit of the book keeper of the old and new firm of T. Labeaume & Co., was also filed, confirmatory of the award.

Upon these affidavits the circuit court refused to vacate the award, but entered up judgment on the same.

The objections taken to this award are of a two-fold character, the first of which are based upon the forms of the submission and award, and the others arise from the conduct of the arbitrators.

The objections to the attestation of the award, are placed upon the hypothesis, that after the delivery of the award to the parties, the arbitrators were *functi officio*, and their subsequent acts were void. In the cases cited by the counsel for the appellant, the law seems to be well settled, that after an award has been made, pursuant to the terms of reference, an alteration of the award, in any particular will not be permitted, and if made, will be a nullity. But the submission in the present case having been made under our statute, which requires the award to be attested by a subscribing witness thereto, the award was not completed until all the forms had been complied with. By the articles of submission, it was agreed that the award should be made a judgment of the court, and by the 6th section of the act concerning arbitrations (Revised Code, '35 p. 71,) this could not be done, unless it was subscribed by the arbitrators and attested by a subscribing witness. Untill both these acts were done, the award was incomplete, and its delivery to the parties in this imperfect state, was nugatory, and could not divest the arbitrators of the power of proceeding to complete the formalites required by the terms of submission. In all the cases alluded to above, an alteration had been made in the body of the award, after the award was complete. Here no alteration has been made, but a neglected formality is supplied. Had it been entirely omitted, the court was authorized by the 10th section of our statute, to correct such defect.

The oath taken by the arbitrators is also objected to, as insufficient. The statute requires them to swear "faithfully and fairly to hear and examine the matter in controversy." The oath taken was, "We do sol-

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emly swear that we will faithfully and fairly hear and examine the matter in controversy, submitted to us by Louis A. Labeaume, Theodore Labeaume and Jonas Newman, trading under the firm of T. Labeaume & Co.; and that we will make a just award, according to the best of our understanding, in conformity to the articles of submission."

Had the words, "trading under the firm of T. Labeaume & Co., been omitted, no objection it is presumed, would have been taken to the form of the oath. The subsequent clause of the affidavit, which recognizes the duty of making an award "in conformity to the articles of submission," we consider sufficient to show that these words were regarded as mere words of description, and therefore merely superfluous.

The remaining objections to the award, are founded upon the conduct of the arbitrators, as disclosed in the affidavits.

Arbitrations being domestic tribunals, selected by the parties themselves, and tending to terminate disputes at less expense than would be encountered in the ordinary courts of justice, courts incline to look upon their awards with indulgence. Mere errors of law, or wrong conclusions as to facts, will not be sufficient to set aside an award; but our statute has provided that there must be corruption or partiality, or some misconduct calculated to prejudice the rights of the parties.

The temper displayed by Chadwick, one of the arbitrators in this case, during the investigation, however unbecoming a person selected to decide upon the rights of others, would not of itself be conclusive of either partiality or corruption. This irritability on the part of Chadwick, and the facility with which he comprehended the complicated accounts of the Labeaumes, constitute the grounds upon which the charge of prejudging the matter is predicated. Chadwick positively denies that he had ever seen their books and papers previous to the trial; he denies that he had ever received any explanations from their clerks, admits however, that Newman had frequently conversed with him on the subject of his dispute with the Labeaumes, and that he had also been spoken to by Mr. Louis A. Labeaume, but he declares that so far as he had any knowledge of the questions in dispute, before the investigation commenced, it was chiefly derived from Mr. Newman.

There are doubtless cases in which *ex parte* meetings or conversations between an arbitrator and the parties to the submission, after the arbitrators had assumed the burden of investigation, would require a court to set aside the award. It does not appear in this case, when these conversations with Newman took place; nor does it seem that they could have had any influence upon the decision, as they were held with the party who now complains. Where the award itself is striking-

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ly unjust, or so grossly offensive as to create a presumption of partiality or corruption, very slight circumstances in the conduct of the arbitrators might be seized upon by a court as indicative of the spirit in which it was conceived. There is nothing of the kind pretended to exist in this case. The settlement of a long and tedious partnership account was involved, and though it is contended that some items were improperly allowed, on one side, and perhaps some rejected on the other, it is not shown to what extent, if any, injustice has been done. The conduct of Chadwick therefore which was certainly not entirely unexceptionable, should not of itself set aside the award.

The exclusion of pertinent testimony is the second objection made to the proceedings of the arbitrators, and if sustained by proof, it is an undisputed ground for vacating the award.

The excluded testimony complained of, relates to the steam boat Howard. Newman states that he offered evidence to prove what were the dividends of the steam boat Howard, received by the partnership (owning said boat) and that the books of the old firm of T. Labeaume & Co., had been so imperfectly kept, that the said partnership had not received the proper credit for the said sums so paid; which evidence the said arbitrators refused to admit. Ranlett says in his counter affidavit, "the arbitrators neither rejected nor refused any evidence offered by either of the parties, unless upon a decision that such evidence was irrelevant; that they had before them the ledger and cash book of steam boat Howard, and all that was necessary to a proper understanding of the affairs of the boat, and to ascertain the dividends received by the firm of T. Labeaume & Co., and so far as recollected, no evidence offered by Newman, relative to the boat was rejected." It will be observed that Newman does not specify the evidence he offered, and the statement of Ranlett and the other arbitrators is explicit that no evidence was rejected which had any tendency to throw any light upon the subject in dispute. It is obvious then, that unless the rejected testimony was stated, it is impossible for this court to determine whether it was properly excluded or not.

The most material objection to the award is the refusal of the arbitrators to compel the production of the books of the new firm of T. Labeaume & Co., upon Newman's alledging that these books would show that moneys had been collected on account of the old firm, which had not been duly credited to that firm.

This refusal however was not persisted in, but on the second day of the session of the arbitrators, the books were produced, and as the arbitrators state, carefully examined by them, and continued before them

until the close of the investigation. Newman states that the books were not so produced "as to be subject to his examination." Nothing can be plainer than that an *ex parte*, or private examination of these books by the arbitrators without an opportunity being afforded to Newman or his counsel to examine them, would not be a *bona fide* production of the books, in the eye of the law, and would bear such evident marks of partiality as to vacate the award. The affidavits of neither party are very clear on this point, but it was the duty and would certainly have been the interest of the complainant, if the fact had been as above suggested, to have placed this matter beyond dispute. His affidavit contains an intimation that the books were not subject to his examination; but how could this be, if they were produced, as the arbitrators declare they were, and constantly before them? For aught stated in Newman's affidavit, he may have declined examining them after the first refusal of the arbitrators to compel their production. If this were the fact he could take no advantage now of the error committed by the arbitrators. The inference that these books were privately examined by the arbitrators without the knowledge of the complainant, which might have arisen from the affidavits of the arbitrators alone, is excluded by the affidavit of Newman himself, which seems to admit that the books were produced, and that he had a knowledge of that fact. If from any motive he did not see proper to avail himself of that production, it was his own fault. How this matter in fact was, we are unable to conjecture; but whatever may have been the facts, it was in the appellant's power to have made them plain, and placed them beyond the reach of surmise.

The fourth objection taken to the conduct of the arbitrators, is that Chadwick examined the books and papers of the Labeaumes privately, after the arbitration commenced. This objection is either resolvable in the preceding one, and so far has been already considered, or it is intended to declare the law to be that an arbitrator may not, after the commencement of the investigation inform himself in relation to the subject matter of controversy, by a private examination of papers publicly submitted. Such a proposition, it need scarcely be observed, is not tenable.

The fifth objection taken by the appellant, is that the arbitrators refused to go into an investigation of the charge that the stock of C. Dunseth & Co., was charged to Newman, at higher prices than the portion of the same stock taken by T. & L. A. Labeaume.

The affidavit of Newman on this point is, "that it was agreed that the taking of the stock in the store of C. Dunseth & Co., should form the

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basis for the taking of the stock in the store of T. Labeaume & Co., that is, that the same articles should be charged alike, in both accounts of stock, irrespective of the cost of the same; and that the other articles in both stores should bear the same proportion to the original cost. That soon after the stock in the store of C. Dunseth & Co., was taken, the said Louis A. Labeaume, assisted by a clerk in the store, proceeded to take an account of the stock of T. Labeaume & Co. The said goods in the store of T. Labeaume & Co., except a small portion, of the value of about twelve or fourteen hundred dollars, which the affiant Newman received, were taken by the said T. & L. A. Labeaume at the prices put down in the account of stock before mentioned, which prices, it is alledged, were not regulated by the prices charged in the account of the stock of C. Dunseth & Co." It is further alledged in this same affidavit, that "the said arbitrators refused to go into an examination, or to hear evidence upon the point that the accounts of stock in the store of C. Dunseth & Co. and in the store of T. L. & Co. were taken differently, and that the same goods were charged at different prices in the two accounts of stock, unless he, the affiant, would prove an express agreement, that the account of stock in both stores should be taken alike, the arbitrators giving as a reason for such opinion, that it was a sale, &c.

The counter affidavits of the arbitrators on this point, is as follows: "The arbitrators examined the invoice of the stock of C. Dunseth & Co., as the said stock was taken by and charged to the said Newman, and found that the invoice at the prices charged, amounted to some sum above three thousand two hundred dollars, and that the stock was charged to Newman at the sum of three thousand dollars; that Newman took the stand or store occupied by C. Dunseth & Co., and immediately commenced the new business of Dunseth & Newman, in the opening of which, the same stock taken by Newman from C. Dunseth & Co. was charged by him to Dunseth & Newman, at the invoice price, which was upwards of thirty-two hundred dollars. The arbitrators found that the stock of T. Labeaume & Co. taken by Theodore and L. A. Labeaume was charged to them at cost prices, and ten per cent. added to one-half said stock; that upon Newman's taking the stock of C. Dunseth & Co., a bill had been furnished to him and no objection made as to prices, and the arbitrators considering the transaction in relation to the stock of C. Dunseth & Co. a sale to Newman, refused to make the prices in that invoice a basis for changing the prices in the account of stock of T. Labeaume & Co., unless Newman would prove that it was agreed between the parties that the prices in the two stocks were

to be the same. And yet the arbitrators in their final settlement of the business in order to equalize the parties and make an average upon the two invoices of C. Dunseth & Co. and T. Labeaume & Co., added the sum of three hundred dollars to the amount of the invoice of T. Labeaume & Co., and made their award upon the invoice thus increased, although they believed Mr. N. was not entitled to claim it as a strict right.

The affidavit of McAdam, taken in support of the award, is "that he was the book keeper of the old firm of T. Labeaume & Co.—that the stock in the store of C. Dunseth & Co., was \$3,204 20, and that after much debate between the said Newman and the Messrs. Labeaume, the said Newman agreed to take said stock at \$3,000, and the transaction was in his opinion, a sale, &c."

The objection of the appellant is that the arbitrators would not allow him to show that the prices charged him, in the invoice of the goods of Dunseth & Co., were different from and of course at higher rates, than the prices of similar articles, as charged in the invoice of that portion which was taken by T. & L. A. Labeaume. The arbitrators deny this, but admit that they required him before he could demand that the invoices should be placed upon the same footing, to prove that such was the agreement of the parties. It seems in truth that the arbitrators did investigate this matter, that they did examine both invoices, and that though they had thus decided against the appellant, as to his legal rights, they still allowed an addition of three hundred dollars to the bill of T. & L. A. Labeaume, in the final settlement, which with the two hundred previously stricken off from the invoice of Dunseth & Newman, was sufficient in the opinion of the arbitrators to effect an equitable average of the prices. How this may have been must depend upon the amount of the invoice of T. & L. A. Labeaume, which is not stated in either set of affidavits.

The affidavit of McAdam, the book-keeper, directly contradicts the statement of Newman relative to an agreement that the prices of the two invoices should be alike.

The only remaining objections to the award is that the arbitrators exceeded their authority in allowing the Messrs. Labeaume for their services in settling up the concern of T. Labeaume & Co., there having been no such charge in the bill of specifications required by the submission; it seems from the statement of Newman that by the articles of co-partnership, the firm of T. Labeaume & Co. purchased an interest in a steam boat, of which Newman was master, and it was agreed that whilst Newman was so employed, his co-partners, T. & L. A.

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Labeaume should be paid out of Newman's share of the profits of the mercantile house, six hundred dollars per annum, each, for his services; but when Newman was out of employment they were to receive only five hundred per annum. Newman having been discharged by the owners of the boat, was during nine months out of employment, in consequence of which he claimed a deduction of one hundred and fifty dollars from the twelve hundred dollars charged by the Messrs. Labeaume. The arbitrators as they state, believing that the services of the Messrs. L. in settling up the business of the firm was fully equivalent to the deduction claimed, allowed the Messrs. Labeaume the full sum claimed. It is not perceived how the allowance of the sum of six hundred dollars could be regarded as an act exceeding the authority of the arbitrators, merely because the making of such allowance may have been drawn from facts not properly before them. It is admitted that the claim of the Messrs. Labeaume for the six hundred dollars per annum, was properly before the arbitrators, but the allowance of the whole claim is objected to, because the arbitrators, in justifying their decision, placed their refusal to make the deduction claimed by Newman on the ground of services rendered by the Labeaumes in settling up the partnership concern of T. Labeaume & Co., for which services no charge had been made in the bill of specifications furnished by the Labeaumes. This claim of the Messrs. Labeaume for the six hundred dollars, was in the bill of particulars; the arbitrators allowed the whole claim, notwithstanding Newman insisted on an abatement to the amount of one hundred and fifty dollars; whether the arbitrators did right in allowing this claim or not, is not a question for our determination. The objection taken rests wholly in the want of power in the arbitrators, and we think that objection is not sustained by the record. The objection is purely technical, and as such is unavailing.

Upon the whole we think the circuit court committed no error in entering up judgment upon the award, and the judgment of that court is therefore affirmed.

ANN DOUGLASS AND THOMAS L. DOUGLASS vs. ROBERT E. BAKER.

1. In an action against a sheriff for failing to levy an execution, it is not necessary for the plaintiff to prove a demand of the money due on the execution, nor that the party has been damaged. Under our statute the officer is liable for the full amount of the execution.

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2. An officer is bound to execute a writ without delay. If, by delay, he become unable to execute a writ which he might have executed, he is liable for damages.
3. He is not justified for failing to levy an execution in his hands, by the passage of the act abolishing imprisonment for debt, if such writ could have been executed before the passage of that act.

ERROR to Callaway Circuit Court.

Todd, for Plaintiff in error.

POINTS AND AUTHORITIES.

The plaintiff insists to reverse the judgment:

1. That no demand of defendant for money is necessary, as this action is in tort.
2. That the officer is bound to use due diligence to serve a *capias*.
3. That the damages for neglect of duty in serving execution is fixed by law, and does not depend upon proof of actual injury sustained.
4. Sheriff is bound to use diligence to levy execution. 1, J. J. Marshall, 551.

J. K. SHELEY, for defendant.

TOMPLINS, J., delivered the opinion of the court.

Ann Douglass and Thomas L. Douglass brought their action of trespass on the case against Robert E. Baker, in the circuit court of Callaway county, where judgment being given against them, they appealed to this court.

The declaration states, that one Daniel Nolly was indebted to the plaintiffs on a judgment obtained in the circuit court of Callaway county, on 6th December, 1842, and that on that day, they sued out of the office of the clerk of the circuit court of said county, a writ of *capias ad satisfaciendum*, against the body of said Nolly; and also a writ of *feri facias*, against the goods, &c., made returnable on the 5th day of April then next following; which was on the same day delivered to the sheriff, the said Baker, to be executed and returned; and charges that Nolly was during all the time intervening betwixt the issuing and return day of said writ, within the county of Callaway, and that Baker, the sheriff, refused to execute it: by which means he lost his debt.

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The judgment and execution were given in evidence. It was also in evidence, that on the first day of January, 1843, one of the plaintiffs told the sheriff to execute the writ on Nolly, by taking his body, and pointing to Nolly, who was passing along the street; and that the sheriff replied, he had heard the legislature had, or was about to pass a law to abolish imprisonment for debt; but that he neither promised to execute the writ, nor declined doing it. It was also in evidence, that Nolly, at the date of the execution, was notoriously insolvent, and still continued so; and that during the winter after the issuing of the execution, he had settled some demands against him, by assigning or otherwise transferring notes.

The defendant then gave in evidence a letter of the Secretary of State, to the sheriff of Callaway county, enclosing the act of 17th of January, 1843, by which, imprisonment for debt was abolished. He gave other evidence of the general reputation of the insolvency of Nolly.

The plaintiffs prayed from the court the instruction following:

1. If they believe from the evidence, that the defendant in the execution was within the county of the officer in whose hands the *capias* was placed, and that he could have been arrested before the passage of the act of the Legislature abolishing imprisonment for debt, then, they will find for the plaintiff.

The third instruction was, that if the jury believe from the evidence, that the execution was not returned according to the command thereof, they will find for the plaintiff.

It was charged in the declaration, that the execution was not returned according to its command, and the return made was, that no goods, &c., of Nolly, were found, and that his body was not taken on account of the passage of the law above mentioned.

These instructions were refused, and the court on the motion of the defendant, gave the following instructions:

1. That the jury must find for the defendant, unless plaintiff has proved a demand of the defendant, for the money in the execution.

2. That the jury must find for the defendant unless they believe the plaintiff had been damaged by the failure of the defendant to arrest Nolly.

The plaintiff excepted to the decision of the court in giving these instructions, as they had before done to the decision of the court in refusing those asked by themselves. The plaintiff then took a non-suit, and afterwards moved to set it aside, for reasons filed, to wit: the giving and refusing the instructions as above mentioned.

The cases cited by the defendant, to prove that the plaintiffs ought to

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have made a demand of the sheriff, all relate to cases of motions against officers for money received by them, and paid over; or of an agent or factor for his principal.

This action is against a sheriff charged with a breach and neglect of duty. In the case of Dygert ads. Crane, 1st Wend. 534, it is decided that assumpsit will lie against a sheriff for money collected by him on an execution, without a previous demand. Much more then, will an action on the case lie against him for a breach of duty. Why make a demand for money, which he has failed to collect? The circuit court then committed error in giving the first instruction asked by the defendant.

The 52d section of the act to regulate executions, p. 260, of the Digest of 1835, declares that, "If any officer to whom any execution shall have been delivered, shall neglect or refuse to execute or levy the same according to law, or shall take any property, or any such property shall be delivered to him by any person against whom an execution is issued, and if such officer shall neglect or refuse to make sale of such property so taken or delivered, according to law, or if such officer shall not return any such writ according to law, or shall make a false return thereof, or after having taken the defendant's body in execution, shall permit him to escape, and shall not have his body according to the command of the writ, then, and in any of the cases aforesaid, such officer shall be liable to pay the whole amount of money, in such writ specified, or thereon endorsed, and directed to be levied."

This section of the act does not require the plaintiff to show that he has sustained damages by the failure of the sheriff to levy or execute the writ according to law, nor does it seem to leave it to a jury to decide the point. The highest evidence of the insolvency of the defendant in the execution would have been the return of the sheriff, such a return as the law at the issuing thereof required him to make. As authorities for this second instruction, the defendant, appellee here, cited, Patterson vs. Westervelt, 17th Wend. 543. The People vs. Adgate, 2 Cowan 504, and 4th Mc Cord's Rep. 142. These reporters do not refer to any statutory provision, in their respective States, and seem to give us what their courts thought to be just in the several cases, and if we had no statute on the subject, the authority of these cases would perhaps be decisive of the case. But when our statute declares that the sheriff on failure or neglect to do his duty shall pay the whole, it would seem that the courts cannot leave it to a jury to decide what damage the plaintiffs in the execution have sustained. The second instruction given for the defendant seems to me so be erroneous.

Bailey vs. Gibbs.

It certainly was the right of the plaintiffs in the execution to have the writ levied and executed as soon as it conveniently could be done after the delivery to the sheriff, and he had no right to wait to see whether the Legislature would pass any act to abolish imprisonment for debt. Every day that he delayed to take the body in execution after he discovered that there were no goods on which to levy, was another risk of the loss of the debt due. Had the body been taken the debtor might have satisfied the execution. It is not given to one man to know what another is able to do. It was testified that the defendant did after the issuing of the execution pay several demands in some manner. And it is reasonable to believe that if he had been taken in execution, he might have exerted himself to do something to satisfy the execution. Waving the enquiry whether the act of the 17th January, 1843, did take from the plaintiffs, the right acquired by this execution to take the body, it is certain that they had it by that execution until the passage of the law, and the sheriff does not seem to derive any right from the old act to indulge debtors at the risk of the plaintiffs in the execution. The first instruction asked by the plaintiffs ought then I think to have been given.

As the sheriff had not arrested the defendant in the execution before the passage of the act abolishing imprisonment for debt, we believe he had no right to do it afterwards. Because then the circuit court gave the two instructions prayed by the defendant and refused the first instructions prayed by the plaintiff, its judgment is reversed and the case remanded.

NAPTON, J. I concur in reversing the judgment. It was the duty of the sheriff to have arrested the defendant in the execution, when pointed out to him by the plaintiff, without regard to any expectation which he may have entertained in relation to the future action of the legislature.

 BAILEY vs GIBBS.

1. Payment of the amount due upon an execution, and returning the same satisfied by an officer without the request of the defendant, does not create an implied promise to pay the debt by the defendant, on which assumpsit may be maintained by the officer.

Bailey vs. Gibbs.

ERROR to Callaway Circuit Court.

TODD, for Plaintiff in error.

POINTS AND AUTHORITIES.

The plaintiff insists to reverse the cause :

1. That assumpsit will lie upon principles of equity when a benefit is conferred to defendant, or injury to plaintiff by defendant's acts.

2. That an officer holding execution upon a failure of defendants to pay it, upon promise, becoming responsible and paying it, can in assumpsit recover the money; and is upon a good legal consideration.

3. That an attorney directing satisfaction of execution without receiving the money, is no release of plaintiff's right, or discharge to the defendants.

4. That the officer returning satisfaction by order of plaintiff, and satisfying the plaintiff, as upon a false return, produces a discharge to the defendants, and such a benefit makes a legal consideration.

5. That a return by order of plaintiff is not contradicted by evidence that an agent of plaintiff or his attorney of record made the order, for the maxim applies : "*quod fecit per aliud, fecit per se.*" 1 Bibb, 564; 8 John, R., 361; 10 Ib. 220; 5 Peter's Sup. Ct. R., 113; 5 Randolph, 639; 6 Litt., 271; 5 Mon. 126; 1 J. J. M. 12.

GORDON AND HARDIN, for Defendant in error.

POINTS AND AUTHORITIES.

1. That the circuit court committed no error in rejecting the testimony of Nolley and Henderson, because it goes to contradict and impeach the record of the return made by plaintiff, as coroner of the county. See 1 J. J. Marshall, 12; 2 Ib. 26; 3 Monroe Rep., 351; Townsend vs Olin, 5 Wend. 207; 4 Monroe R., 399; 3 Litt. R., 44; 6 Mass. R., 325; 15 Mass. R., 82.

2. That the court below committed no error in granting defendant the instruction asked for.

3. The plaintiff could not make the defendant his debtor by voluntarily paying the debt of the defendant, without a previous request by the defendant, or subsequent promise to pay the same to the plaintiff. See Chitty on contracts, 591; 10 John. R., 361; 3 John. R., 434.

Bailey vs. Gibbs.

TOMPKINS, J., delivered the opinion of the court.

William H. Bailey brought an action of assumpsit in the circuit court of Callaway county, against Churchill J. Gibbs, and the judgment of the court being given against him, he appealed to this court.

On the trial of the cause he gave in evidence a record of which it appears that one Jefferson Garth, had obtained a judgment on motion in the circuit court of that county, against the sheriff of that county and his securities, on which judgment and execution was issued, and delivered to the plaintiff, as coroner of said county, commanding him to collect the amount from James Campbell, sheriff, and Churchill J. Gibbs, the defendant and others, his securities, in his official bond. Several credits were endorsed on the execution, and it was finally endorsed thus: "I return this execution, satisfied in full, by order of the plaintiff, this 6th day of August, 1842," and signed by the plaintiff as coroner. No money was in reality paid, but it was endorsed by the direction of the plaintiff's attorney on the promise of another to pay. The attorney about that time, left the country. After the return of the execution, Garth the plaintiff in the execution demanded the money, due on that execution, and Bailey the plaintiff in this cause, to escape a law suit, paid what by his return appeared to be due. This was all the evidence given. Bailey then offered to prove by one Daniel Nolley, that whilst the said execution was in the hands of him, said plaintiff, as coroner, for collection, two of the debtors, Gibbs and Johnson, to whom he (Nolly) was indebted, and for which they held separate notes on him, then due, applied to him for money to assist them in paying their shares of said execution;—that he, Nolley, promised them to *make up* the same except \$35, which one Henderson promised to raise and pay for said Johnson;—that said Nolley called on James H. Tuel, an attorney at law of said court, and attorney of record of said Garth in the collection of this debt, a few days before the return day, and the witness (Nolley) promised to pay the said Tuel, during the term of the court to which the execution was returnable, a sum over one hundred dollars for the said Gibbs and Johnson, and the said Tuel thereupon wrote a return upon the execution, for the plaintiff Bailey, as coroner, to sign, which was done in the witnesses' presence, which return was that the execution was satisfied by order of the plaintiff;—that the said Tuel gave no receipt to the witness upon said return being made, nor were any credits given for any payment of the notes of the witness, held by Gibbs and Johnson, and the witness never paid Tuel the money, or the plaintiff Garth.

McEvoy, to the use of Nelson, vs. Lane and McCabe.

The plaintiff then offered to prove by the above mentioned Henderson, that he had promised to pay Tuel in like manner, thirty-five dollars for Johnson, but he had not done it.

This evidence so offered was rejected, on motion of the defendant, on the ground that it contradicted the record. The plaintiff excepted to this opinion of the court. The defendant then moved the court to instruct the jury, that the plaintiff could not recover on the testimony he had given. The instruction was given and excepted to by the plaintiff. He then took a non-suit with leave to set it aside, and afterwards during the term, he moved to set it aside, and for a new trial, because :

1st. The court on the trial rejected competent evidence.

2d. Because it misinstructed the jury.

The circuit court overruled this motion, and the plaintiff excepted to its decision.

Had the plaintiff been requested by Gibbs to pay on this execution, the amount of Gibbs' indebtedness, I am not able to see that it would be any contradiction of the record for him to prove that fact, nor indeed that what he here now proves, is any contradiction of any part of the record, except that part which states, that the return was made by the order of the plaintiff in the execution, and as he paid the money to the plaintiff he has injured nobody, and indeed the plaintiff in the execution alone had the right to deny the truth of that return. But he proves that he paid this money without the request of Gibbs, and moreover he proves no promise by Gibbs to repay the money. A promise to pay made after the payment, would have been a good consideration to support an action in such a case as this. Nolley, according to the evidence, promised Tuel, Garth's attorney, to pay during the term of the court, and Tuel wrote the return for Bailey to sign, as coroner. It does not appear that Gibbs was even present. If anybody is liable to Bailey, the coroner, on the implied promise, it must be either Nolly or Tuel. It is not seen that the circuit court committed any error, either in rejecting the evidence, or instructing the jury. Its judgment is affirmed.

McEVOY, TO THE USE OF NELSON vs. LANE AND McCABE, GARNISHEES.

1. It not appearing from the record, upon what ground the circuit court, sitting as a jury, based its decision, if there be any evidence on which its finding could be predicated, it will not be disturbed.
2. The answer of a garnishee is evidence in his favor, until disproved.

Von Phul vs. City of St. Louis.

APPEAL from St. Louis Court of Common Pleas.

TOMPKINS, J., delivered the opinion of the court.

John McEvoy, suing to the use of Nelson, obtained a judgment against Henry H. Wright and Christian M. Leggett, in the St. Louis court of common pleas. Hardage Lane and Edmund McCabe, were summoned as garnishees. They denied all indebtedness to Christian Leggett, one of the above defendants, and the court finding such answer to be true, gave judgment for the garnishees, Lane & McCabe. A new trial was moved for all the common reasons, and refused.

On the trial of the cause, McEvoy gave in evidence a judgment obtained by one Moore and Christian M. Leggett, suing for the use of Leggett, against Hardage Lane and Edmund H. McCabe, dated 17th October, 1842. The judgment was obtained first before a justice of the peace, and afterwards on appeal to the court of common pleas, on 5th May, 1843. The judgment in the present case was given by the court of common pleas against McEvoy, in favor of Lane and McCabe, on the 8th May, 1843.

No instructions or decisions of points of law were required by the court of common pleas, and consequently it does not appear on record for what reason the court decided against the appellee. In the case of Knapp and Shea, decided at the last July term of this court, it was stated as the opinion of the court, that the answer of the garnishees was admissible in evidence in their behalf. The court of common pleas did not then decide in favor of the garnishees without evidence. The court might not have believed in the identity of the parties. It was left to decide as well the law of the case as the credit due to the evidence. No instructions being asked, the judgment of the court will be affirmed.

VON PHUL vs. CITY OF ST. LOUIS.

1. The decision of the circuit court, sitting as a jury, will not be set aside, unless the record shew that the circuit court was called on to decide some question of law, and that its decision was wrong.

Von Phul vs. The city of St. Louis.

APPEAL from St. Louis Circuit Court.

A. TODD, for Appellant.

POINTS.

1. There is no proof that the board of health ever made the order served upon the appellant, nor that it was served upon him by an authorized person.
2. The board of health had not authority to make the particular command in said order or notice.
3. The nuisance complained of was caused by the wrongful acts of the appellee.
4. It was the duty of the city to correct this nuisance.

TOMPKINS, J. delivered the opinion of the court.

This was an action commenced by the city of St. Louis, against Von Phul before the city Recorder. Judgment was there given against the defendant Von Phul; and he appealed to the circuit court, where judgment being again given against him, he appealed to this court. The cause was tried before the court without the intervention of a jury. Some evidence was given on each side. After the court had found its verdict and given judgment thereon, the defendant moved for a new trial: Because the verdict was against the evidence, and against law.

No instructions appear to have been asked of the court as to the law of the case: This court is not inclined to reverse judgments of the circuit courts in cases where those courts have expressly decided no point of law. In such case, the appeal seems to be taken rather from the verdict of the jury than the decision of the court.

In a case like this, where the court discharges the duty of a jury as well as its own peculiar duty, it seems more particularly necessary that the appellant should call on the court to decide the law arising on the facts detailed in the evidence. No such decision being made, this court feels no disposition to disturb the verdict rendered by the court sitting as a jury.

The judgment of the circuit court must then be affirmed.

Young vs. Kelly.

YOUNG vs. KELLY.

1. Where evidence is given by each party to a suit, and no points decided by the court have been saved by a bill of exceptions, the appellate court will not disturb a verdict, especially if found by the circuit court, unless it be glaringly wrong.

APPEAL from Monroe Circuit Court.

D. TODD, for Appellant.

The appellant insists upon the following points to reverse the judgment of the inferior court.

1st. Because Young being surety only to the principal debt, is not co-security with Kelly in the same degree. The security of Kelly was personal to Fugate and for his benefit alone. Theobald on Princip. Security, 202. Contribution only exists between securities in same degree and for the same debt, *ibid*, 197.

Assumpsit lies upon express or implied promise to pay; the law will not imply a promise by one surety to pay another who contracts personally for the principal and for his benefit. 5 Johns. R. 177; 3 Bibb 228.

The recognizance on the appeal and judgment thereon, is a discharge of the original demand and the judgment on it; and when the security is discharged of the original demand, no recovery can be had for contribution.

KIRTLY, for Appellee.

The record in this case presents the single question, whether there was evidence given to the judge which warranted his finding in favor of Kelly for any amount?

I rely and shall insist upon the point that the verdict was right.

By the 1st section of the 1st article of the act to establish justices courts and to regulate proceedings therein, it is provided, "That every justice of the peace is authorized to hold a court for the trial of all actions in the two next sections enumerated; and to hear, try and determine the same according to law and equity." In the 2d section of the same article, jurisdiction is given to justices of the peace over all ac-

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tions of debt, covenant and assumpsit, and all other actions founded on contract, when the debt or balance due, shall not exceed \$90. See Statutes of Missouri, 1835, p. 348.

TOMPKINS, J., delivered the opinion of the court.

Abram Kelly commenced his suit before a justice of the peace in the county of Monroe, and judgment being given against him, he appealed to the circuit court in that county.

When the cause was brought into the circuit court neither party requiring a jury, it was submitted to the circuit court sitting to try the cause, both as judge and jury. A new trial was prayed for all the common reasons, and refused. Much evidence was given by each party to the suit, and no instructions were asked by either; that is to say, the court was asked to decide no point of law arising on the evidence given, although such instructions or decisions might well have been asked.—The 31st section of the act to regulate the practice in the supreme court on appeals and writs of error in civil cases, directs that, "No exception shall be taken in an appeal or writ of error, to any proceedings in the circuit court except such as shall have been expressly decided by such court."

The court as before observed was required to decide no point of law; this court then cannot tell whether or not it misconceived the law, or whether it did not believe the evidence of the plaintiff in error. The jury or court that tries a cause on the evidence has opportunities far better than this court has, to judge of the credit due such evidence; and therefore it is always unwilling to disturb a verdict, especially one found by the circuit court, when that court has not been required to decide the law arising on the evidence given.

The judgment is affirmed.

HELM vs. BASSETT.

1. A writ of error will not lie for granting a new trial, after the second trial is had. It only lies upon a final judgment.

Helm vs. Bassett.

ERROR to Randolf Circuit Court.

CLARK AND TODD, for Plaintiff.

The counsel for the plaintiff in error, rely upon the following points and authorities to reverse the judgment of the circuit court :

1st. There was evidence of the speaking of the words as charged, and also of the intention of the defendant when he uttered them, as well as of the understanding of the hearers, and that where there is evidence from which a jury may find one way or the other, a court ought not and will not set aside their finding, although such finding may be different from what the court would have found. To authorize the interference of a court, the finding of the jury must be *clearly and flagrantly against the evidence*. Hardins Rep. 596, Taylor vs. Giger, 3 Cowen 231; Goodrich vs. Woolcot, 5 Cowen, 714; 4th Mo. Rep. 295; Oldham vs. Herndon, 6th Mo. Rep. 61; Dooley vs. Kirkland, 1st Mo. Rep. 14; McKnight vs. Brady, 7th Mo. Rep. 220.

2d. The circuit court did not err in the instructions given and referred.

3d. If the circuit court erred in granting a new trial, the last verdict ought to have been set aside and a judgment entered upon the first verdict; and that the motion to the court for that purpose, was made at the right time. 4th Mo. Rep. 86, Hill vs. Wilkins; Harden's Reps. 586, Taylor vs. Giger, 5th Mo. Rep. 62, Martin vs. Hays.

LEONARD, for the defendant.

In support of judgment of the circuit court, it will be insisted for the defendant in error, without going at all into the merits of the case, upon the law as ruled by the circuit court on the first trial, or upon the finding of the jury on the evidence upon the trial—that

1st. This court will not reverse a judgment unless it appear affirmatively by the record that the circuit court erred.

And in the case at bar it cannot so appear, because the record does not show,

First. What evidence was offered by the defendant on the first trial and rejected by the court,—or that there was no evidence so offered and rejected,—or

Second. What instructions were refused and what given to the jury, or

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Third. What was shown on the hearing of the motion to set aside the verdict, as to the misreading of the instructions to the jury.

2d. The granting of a new trial cannot be assigned for error, if the party complaining, instead of abandoning his case at that point goes into a second trial. *Davis vs. Davis*, 8 Mo. Rep. 56.

3d. If it be material in this case to inquire into the propriety of the grant of the new trial by the circuit court, it will then be insisted for the defendant, that the new trial was properly allowed.

SCOTT, J., delivered the opinion of the court.

This was an action of slander brought by Helm against Bassett, in which Helm recovered a verdict of four hundred and seventy dollars. A motion was afterwards made for a new trial, which was sustained, and on a second trial, Helm obtained a verdict for sixty dollars. Helm then moved the court to enter judgment on the first verdict, as the motion for the new trial had been improperly sustained. This motion was overruled, and the cause is brought up by writ of error.

The question presented by the record in the case is whether a writ of error will lie for granting a new trial? It must be confessed that contradictory opinions have been expressed by this court in relation to this matter. As this however is a rule of practice not affecting the rights of property, an unsteadiness in its application cannot be the source of that degree of regret, which must be caused by an uncertainty in the rules which govern the acquisition and transfer of property, and it is of some importance that the practice of our courts should be in accordance with the principles of law.

In the case of *Johnson vs. Strader & Thompson*, 3 Mo. Rep. 355-8, the court upon the first argument of the cause, inclined to the opinion, that the granting of a new trial could not be assigned for error: Upon a re-argument however, that opinion was changed, and it was held that it was error. So it was held in the case of *Wilkins vs. Hill*, 4 Mo. Rep. 86. The question does not appear to have come up again until the cases of *Davis vs. Davis*, and *Geo. W. Samuel et al vs. Benjamin R. Morton*, 8 Mo. Rep. In these cases it was distinctly declared that if error would lie for such a cause, the party aggrieved must seek redress before there is a second trial on its merits; that he would not be allowed to acquiesce in an opinion, take the chance for success in a second trial, and after a defeat, recur to the original error. There is an obvious distinction between granting a new trial and the refusal of one. By granting a new trial the cause is kept open, another oppor-

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tunity is afforded for an investigation of its merits, and the injury, if any, is that merely of delay; whereas on the other hand the refusal of a new trial precludes a party from all redress in future, and the injury committed is irreparable. The injury resulting from the granting a new trial, is like that caused by allowing the continuance of a cause. The law has that degree of confidence in its own administration, that it contemplates, that he who is entitled to a verdict in a cause at one time, will obtain it at another; and the contrary idea goes upon the supposition, that a trial by jury is a game of chance, and he who is once successful has no assurance that at the next throw of the die, he may not prove altogether a loser. There are many cases in which the court that tries a cause will not interfere with the verdict, although it might have rendered a different one had it been sitting as a jury; but generally speaking the court must be satisfied with the finding, otherwise it is its duty to grant a new trial. So the concurrence of the court with the jury is in most cases necessary in the administration of justice.

A writ of error only lies upon a final judgment by a party or privy aggrieved thereby. If a new trial is granted in a cause, and then a second verdict, and the appellate court is entirely satisfied with it although it may be of opinion that the inferior court improperly exercised its discretion in granting a second trial, yet as that act has been the means of doing complete justice between the parties on the merits, why should it be objected for error? In such a case is there any error in the final judgment, which is within the spirit and meaning of the law, allowing a writ of error on a final judgment? There is no error complained of in the proceedings on the last trial, but the record of it is only used as a means of correcting an alleged error committed on another occasion, which does not at all affect its justice, or its merits, so in fact the appellate court does not revise it, but is required to use the record of it, to effect that indirectly which cannot be done directly. Now a proceeding which overturns established law, and which seeks to accomplish that by indirect means, which cannot be done directly, ought not to be tolerated. It has been held that a writ of error could not lie on an arrest of judgment, for the reason that there is no judgment. *Fisk vs. Weatherwax*, 2 John. Cases, 213; *Horne vs. Barney*, 19 John, 247. It never occurred to any one in those cases, that this objection might be obviated by going through another trial and suing out a writ of error on the judgment last rendered, and by so oblique a mode of procedure, and in perversion of the principles of law, obtain a correction of an error which the law

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would not permit to be done directly. What is the difference in principle between the case of an arrest of judgment, and a new trial? Does not the objection to the one hold equally with regard to the other? What is here said in relation to an arrest of judgment not being a ground for a writ of error, is intended to be understood only of a bare arrest, and is applicable to those cases in which the plaintiff has not had a final judgment entered against him, in such, as well as those wherein a new trial is improperly granted. A mandamus seems in New York to be the remedy. See cases above cited, and 5 Wendell 144; the *People vs. the Superior Court of the city of New York*.

As far as our examination has extended, the courts of Kentucky alone hold that a writ of error will lie for granting a new trial. The principle is merely laid down in their book of reports, without offering any reason or authority in support of it, or making any attempt to obviate the objections which have been urged against its existence.

Judgment affirmed.

JAMES O. BROADHEAD, ADM'R. vs. MICHAEL J. NOYES.

1. Although the nature and effect of a contract depend upon the law of the State in which such contract is made, or is to be performed, the remedy for a breach of such contract must be governed by the law of the State in which the redress is sought.
2. An action of covenant will not lie in this State, upon an instrument of writing executed in another State, and which by the law of such State would be regarded as under seal, if by the law of this State such instrument be not also held as sealed.

ERROR to Pike Circuit Court.

GLOVER AND WELLS, for Plaintiff in error.

POINTS AND AUTHORITIES.

The only point made is, that the court erred in sustaining the demurrer.

1. The first three counts of the plaintiff's declaration are good, because the instruments sued on were covenants duly sealed by the law of Kentucky, and must be regarded so here. 1 Starkie Ev. 372; 3 Tomlin's Law Dictionary, 441; 1 Shep. Touch. 51; 6 Binney, 329; 2 Coke, 274; 2 Bibb, 14; 4 Kent, 452, note C.

2. By the law of Kentucky, 1812, these instruments had the same dignity, force and obligation as sealed instruments, and must have the same here. 5 John R. 244, 4 John R. 288; Chitty Con. 92; 25 Eng

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Com. Law R. 263 ; 1 Rand. 23 ; 1 Cow. 320 ; 1 Bosanquet and Bul. 360.

3. If the instruments sued on were covenants or have the dignity and force of covenants in Kentucky, then the remedy by action of covenant being an appropriate remedy upon such instruments by the laws of Missouri, the action was well brought. Chitty Con. 94.

PORTER, for Defendant in error.

POINTS AND AUTHORITIES.

1. The defendant in error submits to the court and insists that the decision of the *questions* raised by the demurrer in this case whether an action of covenant will lie on the instrument in question, depends upon the law of Missouri, and not the law of Kentucky, the *lex fori* and not the *lex loci contractus*, and cites Story's Conflict of Laws, p. 475, sec. 567, in which cases analogous to the one at the bar are cited for the illustration of the principles.

2. That the instruments in question *are unsealed*; he cites Boynton vs. Reynolds, 3 vol. Mo. Dec., and Cartmill vs. Hopkins, 180, 2 vol. Mo. Decs.; and the last case also, as to the *point* of the effect of defendant's removal from Kentucky, 5th vol. same, Grimsley vs. Riley ; 8 vol. do. Glascock vs Dodge. Even according to the law of Kentucky in regard to seals as construed by the court of appeals under the act of 1812, the instruments in question are *unsealed* and cites Dillingham vs. Estill, 3 Dana's Kentucky Reports, p. 21. On the first point the question whether covenant will lie is referable to the remedy and the effect of evidence and not the nature, obligation and construction of the contract, and as conclusive on this point he cites the case of Steele vs. Curle, 4 Dana's Reports, p. 382, and *ultra*.

The object of the plaintiff in error in bringing covenant in this case is to avoid the statute of limitations, relying upon the decision of the court in the case of Pennington vs. Castleman, this question of limitation depending incontestably upon the *lex fori*; and the defendant submits *whether the principle of comity* will be permitted in any instance to go this extent.

SCOTT, J., delivered the opinion of the court.

This was an action of covenant brought by the plaintiff in error against the defendant on three several instruments executed in the State of Kentucky. To the instruments a scroll was affixed by way of seal,

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but it was not recognized as such by anything contained in the body of the instruments, and consequently by our law, they are regarded as unsealed. The defendant demurred to the declaration and had judgment, from which the plaintiff has sued out this writ of error.

The question arising in this case is, whether if an action of covenant will lie on an unsealed instrument in the State or country in which it is executed or to be performed, must a party who sues in this State on such instrument bring an action of covenant, or must his remedy conform to that given on similar instruments executed in this State?

We will not stop to enquire whether the instruments set out in the declaration are regarded as sealed or unsealed by the laws of Kentucky: we deem that enquiry of no importance in the determination of the question involved in this case; it may be assumed that they are considered as sealed by the laws of Kentucky. Indeed the very investigation into which the plaintiff in error invites us, shows the extreme inconvenience of the principle for which he contends. A citizen of this State holding an instrument on which he is desirous of instituting suit, instead of consulting his own laws, is required to enter into an examination of the laws of another State, in order to ascertain in what manner his suit is to be brought. An instrument may be executed in China, in countries whose modes of procedure in judicial transactions are utterly dissimilar to those prevailing amongst us; will our courts be required to instruct themselves in the laws of all these States, so as to be enabled to administer justice between the parties who may litigate in relation to such contracts before them.

Authority as well as reason is decidedly opposed to the principle contended for by the plaintiff in error. This is a branch of the law which owing to our frame of government, being a confederacy of States, is constantly undergoing discussion in our courts, and as questions of this kind must frequently arise, it is a matter of importance that they should be settled as well with regard to convenience as to that of comity which gives force and effect to a contract as it is understood in the country in which it is entered into. The difficulty in these questions arises from the want of a line distinctly discriminating between those which are to be determined by the *lex loci contractus*, and those by the *lex fori*. It seems to be settled that the law of a place where a contract is made, or is to be performed, is to govern as to the nature, validity, construction and effect of such contract, and that being valid in such place, it is to be considered valid everywhere, and to be enforced in all courts, unless such contract is injurious to the interests, rights and convenience, or conceived in a spirit of hostility to the laws and institutions of the State

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in whose courts it is attempted to be enforced; and on the other hand if a contract is void by the laws of the place where it is made or to be performed, it is held to be invalid everywhere, and no court will aid in carrying it into execution. *Pearsall vs. Dwight*, 2 Mass. Rep. 84; *Sherrill vs. Hopkins*, 1 Cowen's Rep. 103; *Story's Conflict of Laws*.

But while the *lex loci contractus* will govern as to the construction and validity of a contract, it seems very clear that the *lex fori* will give the law as to the manner in which a contract is to be enforced, or in other words will determine the remedy. The remedy has been frequently confounded with the essence of contracts, and hence in the early cases on this subject, there is a confusion which leaves the matter involved in obscurity and uncertainty; but recent decisions leave no doubt on the question presented by the record of the case now under consideration. In *Andrews vs. Hirriot*, 4 Cowen 508, an action of covenant was brought in the courts of New York on a contract to be performed in Pennsylvania, with a scrawl with the "seal" in the *locus sigilli*, which by the law of that State constituted the seal; the court held that covenant would not lie; that the instrument would not be regarded as a sealed one by the laws of New York; that the form of the action relates to the remedy and is governed by the *lex fori*, and that to sanction a contrary doctrine would overturn the entire class of cases, which distinguish between the different effects of the *lex fori* and *lex loci*. The same principle is maintained in the case of *Trasher vs. Everhart*, 3 Har. & Gill, 234, and in the case of *Steel vs. Curl*, 4 Dana Rep. 381. See also *Story's Conflict of Laws*, 475.

Judgment affirmed.

 STEAMBOAT CHARLOTTE vs. JOHN R. HAMMOND.

1. The lien of a mechanic upon a boat, under our Statute, is not affected by his parting with the possession. A purchaser is bound to exercise ordinary diligence, or he will not be protected by want of notice.
2. A note given, and payable at a future day, but within the duration of the lien, will not merge the original debt, nor extinguish the lien.
3. Neither a note, nor a receipt in full, without a special agreement, will extinguish the original demand.
4. Whether there was a special agreement by which the original demand became extin-

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guished by a note, or receipt in full, is a question of fact for a jury, and cannot be decided by a court. In such cases parol testimony is admissible to explain.

HAMILTON, GEYER AND DAYTON, for Plaintiff in error.

SPALDING AND TIFFANY, for Defendant in error.

POINTS AND AUTHORITIES.

1. The giving the notes by the owner of the boat did not discharge the lien, so as to prevent the prosecution of the claim, under the act of Assembly, against the boat by name. 6 Missouri Rep. 552, 555.

2. The giving of a note is not an extinguishment of the original cause of action, unless there was an express agreement *that it was given and received in extinguishment*, and that the plaintiff took upon himself the risk of the payment of the note. United States Reports, 10 Peters' Rep. 567; 6 Cranch Rep. 253; 4 Mason's Rep. 142, (New York Rep.) 16 John. Rep. 277; 5 John. Rep. 68; 7 John. 310; 17 Ib. 340; 8 Ib. 389; 9 John. 310; 8 Cowen 77, 472; 9 Cowen Rep. 23; 7 Wend. 424; 3 Wend. 36; 5 Wend. 85; 2 Vermont Rep. 290; 4 do 555; 2 Gill and Johnson's Maryland Rep.) 493; 4 Ibid 305; 3 Har. and Johnson (Maryland) 193; McCord's (South Carolina) Rep. 499; 3 Serg. and Rawle 223; Chitty on Contracts, 5th American Edition, 767; and cases cited, also Bailly on Bills, and cases cited. In Chitty it is stated that the civil law and the Scotch law are the same as above.

3. The language of the receipt is not sufficient evidence that the note was taken in extinguishment of the original cause of action. 2 Gill and John. 493, Glen vs. Smith, 1 Cowen 290; Muldon vs. Whitney, 2 Term Rep. 52; Puckford vs. Maxwell, 9 John. Rep. 309; Johnson vs. Weed, 8 John. Rep. 389; Putnam vs. Lewis, adm'r., 5 John. Rep. 68; Toby vs. Barber, 2 John. cases 438; Murray vs. Gouverneur, 7 Har. and John. 91.

These cases show that when receipts are given *in full* of the debt, &c., on the reception of notes, the debt is not held to be extinguished without further proof.

4. By analogy to other liens, it will be seen that the lien in the present case is not discharged, as

First, In case of a note of hand given on sale of land, the lien for the purchase money is not destroyed. 4 Mo. Rep. 253; 6 Mo. Rep. 605;

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4 Kent Com. 153; 1 Mason 213; 5 Hammond 35; 1 Schooler and Lefroy 132; 2 Vesey and Beaume 306; 3 Bibb; 1 J. Chy. Rep. 308.

Second, The lien of seamen for wages is not discharged by taking a draft, see Ware's Reports, (Maine) case of the Eastern Star, nor by taking a bill of exchange. See 3 Haggard's Admiralty Reports 238, and Curtis' rights of seamen 319.

Third, The statutory lien in the case of attachment in Missouri, is not released by giving bond. &c 7 Mo. Rep. 411.

Scott, J. delivered the opinion of the court.

This was a proceeding instituted by the defendant in error, against the plaintiff in error, under the statute providing for the collection of demands against boats and vessels. The plaintiff in error was indebted to the defendant in error, a mechanic, for materials furnished and labor performed on her. The plaintiff's statement of the cause of action contains an account of the services rendered, at the foot of which is a receipt in these words, "Received payment by note 4 months, dated May 3d." The note thus given by the owner of the boat accompanies the statement of the cause of action, and forms a part of it. After the execution of the note, and before the commencement of the suit, the owner of the boat sold to Richard Ackerman, who had no notice of the incumbrance of the defendant in error. The plaintiff in error asked the court below the following instructions: "If the jury find that the receipt at the foot of the account, given in evidence by the defendant was executed, and delivered by the plaintiff to the owner of the steamboat Charlotte, then said receipt is evidence that said notes were given and received in payment of said account. If the jury find that said receipt was executed and delivered by the plaintiff to the owner of the boat, and that said boat was afterwards sold and delivered in good faith by the sole owner, to a person who at the time the account so receipted accrued, was not an owner, then the plaintiff is not entitled to recover for any item in said account, unless it is proved to the satisfaction of the jury that said notes were not accepted by the plaintiff in payment, and that the purchaser at the time of the purchase by him, had no notice of that fact. If the jury find from the evidence that after the execution of the receipt of the plaintiff, given in evidence, the then sole owner of the steamboat Charlotte sold and conveyed said boat Charlotte to another, before the commencement of this suit, then that receipt is conclusive evidence that said notes

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were given and received in payment of the account at the foot of which it is written, and said receipt is not affected by any understanding between the parties thereto, unless the purchaser at the time of the sale had notice of such understanding. If the jury believe from the evidence, that whilst the plaintiff owned and possessed the note accompanying his complaint, and before its maturity, Herman L. Hoffman, as the owner of the Charlotte, sold her to a third person, who at the time of his purchase had no notice of the plaintiff's claim of lien, the plaintiff cannot recover in this suit any part of his said demand, covered by said note, whether it was intended by the parties as payment or in liquidation only of such account."

These instructions were refused, and the court instructed the jury that the receipt given in evidence by defendant in this case, does not discharge the lien of the debt on said boat if it previously existed.

Exceptions were taken to the instruction. A verdict was found for the defendant in error, and after judgment the case was brought to this court.

The instructions refused and that given, indicate the points involved in this case.

In respect to personal property, a lien at common law, is defined to be, "the right which one person in certain cases possesses of detaining property placed in his possession, belonging to another, until some demand which the former has, be satisfied." East 235. These liens exist only while the party entitled to them, continues in possession of the property on which they have attached, and if the possession is relinquished after the lien attaches, the lien is gone. By parting with the possession, the creditor shows that he trusts to the personal credit of the debtor, and if liens were allowed to remain upon goods, after they had been sold, the consequence would be highly injurious to trade, as no person could know where he purchased with safety. *Jones vs. Pearle, Strange 556*. It has been held that the circumstance of contracting for a particular sum instead of relying on the contract for a reasonable reward, is of itself a waiver of the lien. This, however, is now denied to be law, and the opinion seems to prevail that nothing but a contract inconsistent with the idea of the existence of a lien is a waiver of it. *Metcalf's Yelverton 67 (c.)*

The foregoing are principles of common law relative to liens on personal property which prevail in all cases, except those wherein they are changed or modified by statute law. The act of Assembly providing for the collection of demands against boats and vessels, gives to mechanics a lien on boats for their materials and services in repair-

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ing them, and prescribes a manner of proceeding, by which those liens may be enforced. It is also provided that all actions under it, shall be commenced and sued within six months after the cause of such action shall accrue. As the period during which suit may be brought to enforce the lien is extended to six months, the legislature must necessarily have contemplated that the lien should continue for that length of time; and in giving the lien that duration, it must have intended that the relinquishment of the possession of the boat on which it had attached was not a waiver of it. Such being the law, its object can only be effected by an application of the maxim *caveat emptor* to all purchasers of boats and vessels. If a purchaser without notice could hold the boat discharged of the lien, the Statute conferring it would be a dead letter. Purchasers must exercise ordinary diligence, and knowing that boats and vessels are subject to liens, notwithstanding they are out of the possession of those entitled to the liens, they should indemnify themselves against losses which may be caused by their existence.

A note payable at a future day would extinguish a lien on personality at common law, because by giving time the creditor ceased to have a right to immediate satisfaction, and therefore could not retain possession of the thing to enforce it, but under this Statute it cannot be seen how the giving of a note is an extinguishment of the lien. As the law continues the lien, notwithstanding the creditor relinquishes possession of the property on which it attached, there is nothing unreasonable in allowing him to take a security evidencing his demand. The fact that the note is made payable at a future day, but within the period limited for the duration of the lien, no more relinquishes it, than an agreement to stay execution on a judgment for one year from its rendition, would destroy the lien, which by our law is extended to three years.

It cannot be contended that a note without a special contract, is an extinguishment of the original cause of action. *Sheely vs. Mandeville*, 6 Cranch 264; *Ward vs. Evans*, 2 Lord Raymond 928. Although this principle was not denied in argument, yet it was contended that the receipt at the foot of the account, was evidence of the contract by which the original cause of action was extinguished. In the case of *Johnson vs. Weed*, John 309, an account was closed by a note of a third person, with a receipt in full at the bottom, and it was held that if it was a part of the original agreement between the parties, that the plaintiff should take the note in full satisfaction of the goods sold so that he, and not the defendants, should run the risk of the note, then undoubtedly the plaintiff has no right to an action; and that when a receipt in full has been given, it is a question of fact for a jury to de-

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termine under all the circumstances whether there was such an agreement as would extinguish the original cause of action. With respect to the receipt, it was said that its terms were not decisive. It might still have been understood consistently with the words of it, that the note was received in full, under the usual condition of its being a good note, and besides receipts have always been held open to explanation by parol evidence. The same principle is maintained in the case of *Toby vs. Barber*, 5 John. 68, in which it was determined that a note, is not an extinguishment or payment of a precedent debt, unless there is an express agreement to accept it in payment and to take the risk of the solvency of the maker. *Muldon and Montgomery vs. Whitlocke*, 1 Cowen 290. The Supreme Court of the U. States in the case of *Peter vs. Beverly*, 10 Peter 568, recognizes and adopts the principle contained in the foregoing cases.

The case of *Johnson vs. Weed*, above cited, shows that is a question of fact for the jury to determine, whether a receipt in full is under all the circumstances, evidence of a contract, which extinguishes the original cause of action. If such be the law, the instruction of the court to the jury usurped its province, and determined a matter of fact. For this cause the judgment must be reversed and the cause remanded.

STEAMBOAT CHARLOTTE vs. LUMM, TO THE USE OF HAMMOND.

1. Although a note does not extinguish the original cause of action, but only suspends the right to sue during the time given in the note, yet a party cannot recover on the original contract, without producing the note, or accounting for its absence.
2. The discharge of the maker of the note under the bankrupt law, does not excuse the production of the note.

ERROR to St. Louis Court of Common Pleas.

HAMILTON, GEYER & DAYTON, for the Plaintiff in error.

POINTS AND AUTHORITIES.

The counsel for the plaintiff in error insists that the judgment of the court below ought to be reversed for the following reason :

1. That the court erred in the instructions given.

Steamboat Charlotte vs. Lumm, to the use of Hammond.

2. The court erred in refusing the instructions asked by the defendant.

First, then, in regard to the instructions given.

The bill of exceptions discloses that it was contended at the trial that a note for \$550, executed by Hoffman to Lumm, on account of the work and materials, was still outstanding; in proof of which a receipt of the date of April 14th, 1842, for a note of that amount, and the statement and belief of Hoffman in relation to the matter were offered. It was claimed that such note should be produced at the trial and cancelled, or else accounted for, otherwise that a judgment could not be rendered for the original amount of account, for which that note was given.

The instruction took away from the jury the consideration of the question whether such note was outstanding, and assumed that Hoffman's discharge in bankruptcy dispensed with the necessity of producing or accounting for it.

We suppose that it will be conceded that but for the discharge, the note must have been produced or accounted for, or the amount allowed to the defendant. But see *Holmes vs. DeCamp*, 1 John Rep. 34; *Angel vs. Felton*, 8 John's Rep. 149; *Cummins vs. Huckley*, 8 John's 202; *Pintard vs. Fackington*, 10 John's 104; *Smith vs. Lockwood*, 10 John's 366; *Glenn vs. Smith*, 2 Gill & Johnson 493; *Hughes vs. Wheeler*, 8 Cowen, 77. There appears to be no conflict of authority on this point.

The discharge of Hoffman furnished no reason for dispensing with producing or accounting for the note; for Lumm or a *bona fide* holder of the note might prove it up, under Hoffman's bankruptcy, and thus obtain its proportion of the effects. See bankrupt law, sec. 5.

Second. In regard to the instruction asked for by defendant's counsel, and refused :

It is assumed that the order of Lumm in favor of Hammond, and the acceptance thereof by Hoffman on the 22d of April, 1842, operated as a transfer from Lumm to Hammond of all of the demand sued for, existing at that time.

It is contended on the part of the appellant that such transfer discharged the lien.

This point is made in the case of *Kingsland and Lightner* to the use of steam boat *Charlotte*, and the counsel refer to the suggestions and authorities upon the point in that case.

SPALDING AND TIFFANY, for defendant in error.

Steamboat Charlotte vs. Lumm, to the use of Hammond.

POINTS AND AUTHORITIES.

The defendant in error maintains :

1. That the giving the note by the owner of the boat did not discharge the lien. 6 Mo. Rep. 552, 555.

1. The giving the note was not an extinguishment of the original cause of action, unless there was an express agreement *that it was given and received in extinguishment* of the debt, and that the party took upon himself the risk of the payment of the note. 10 Peters' Rep. 567.

3. And the language of the receipt is not sufficient evidence that the note was taken in extinguishment of the original cause of action. 2 Gill & Johnson, 493, 1 Cowen, 290, 6 Term Rep. 52; 9 John's Rep. 309; 2 John's cases, 438; 7 Har. & John, 92.

4. Other liens are not discharged by the taking a note or bill. 4 Mo. Rep. 253; 4 Kent 153; 2 Vesey & Beaume, 306; 1 John Chy. Rep. 308; 7 Mo. Rep. 411. And see the authorities cited in the case of Charlotte vs. Hammond.

5. The court did not err in giving and refusing instructions.

SCOTT, J., delivered the opinion of the court.

This is a suit involving the principles determined in the case of the steamboat Charlotte vs. John R. Hammond, decided at this term of the court. The fact that the note given in liquidation of the account, was not produced on the trial, constitutes the only difference between the cases. Hoffman, the owner of the boat, who executed the note, had been declared a bankrupt and obtained a final discharge before the commencement of the suit.

The law seems to be well settled, that although a promissory note does not extinguish the original cause of action for which it was given, without a special contract imparting to it that effect, but only suspends the right to sue during the time the note has to run, yet it is so far regarded as a payment, that the party to whom it has been given, cannot recover on the original cause of action without producing the note on the trial, and cancelling it or accounting for its non-production. Angel vs. Felton, 8 John, 149; 1 John, 34; Holmes vs. DeCamp; Raymond vs. Merchant, 3 Cow. 147; Hughes vs. Wheeler, 8 Cowen, 77.

Although Hoffman obtained a final certificate under the bankrupt law, yet that will not excuse the non-production of the note, as it might have been proved under the proceedings in bankruptcy.

Judgment reversed.

Steamboat Charlotte vs. Kingsland and Lightner, to the use of, &c.

STEAMBOAT CHARLOTTE vs. KINGSLAND & LIGHTNER, TO THE USE OF, &c.

1. Receiving a negotiable note in payment of an account, and its transfer by an endorsement in blank, and delivery to one who received it on the faith of the lien, do not extinguish the legal right to enforce the lien by the payee in a suit to the use of the holder.

ERROR to St. Louis Court of Common Pleas.

HAMILTON, GEYER & DAYTON, for Plaintiff in error.

POINTS AND AUTHORITIES.

The instructions prayed by the defendants disclose the true law of this case.

1. The original demand was liquidated by the negotiable mercantile paper, the endorsement and delivery of which to Simonds, Morrison & Boggs, who have ever since held and owned them, transferred all right of action to the said parties. The nominal plaintiffs have incurred no responsibility by reason of their endorsement, as no steps appear to have been taken to fix them. This claim, therefore, as to them, is paid, and they have no interest either legal or equitable in the subject of this suit. The right of lien is personal, and cannot pass into the hands of a third person as an incident to the notes, especially so when the original claimant is in effect paid, and against whom no continuing liability exists.

2. The same reasoning applies to the second instruction. Ackerman purchased the boat *bona fide* from the sole owner, when not only he had no notice of the claim of lien, but at a time when the nominal plaintiff had in fact parted with the debt and lien, and all evidence of either. He therefore is entitled to protection. See on the case 3 Cranch, 311; John R. 34; N. H. Rep. 282.

SPALDING & TIFFANY, for Defendants in error.

POINTS AND AUTHORITIES.

1. Giving the notes as evidence of the debt did not discharge the lien or extinguish the original cause of action. 2 Vesey & B. 306; 1 John Chy. Rep. 308; 6 Mo. Rep. 552, 555; 10 Peters' Rep. 567; 6 T.

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R. 52; John Rep. 309; 2 John's Cases, 438; Bailey on Bills; 7 Mo. Rep. 411.

2. The transfer of the account and note (being by delivery, and not by written assignment, except the endorsement of the plaintiff's name) by plaintiffs to Simonds and others, did not divest the lien.

3. The fact that the boat had changed owners does not affect the case, as by the statute the lien does not depend on the knowledge of the vendee of the boat.

SCOTT, J., delivered the opinion of the court.

This is a suit like two others determined at this term of the court in which the steamboat Charlotte was plaintiff in error. The difference between them consists in this: that Kingsland and Lightner who held a lien on the boat, for services rendered, endorsed in blank, the notes they received in liquidation of the account, and delivered them to Simonds, Morrison & Boggs, who received them on the faith of the lien, and who directed the institution of this suit, which was brought in the name of Kingsland & Lightner, and the notes given in liquidation of the account, were attached to the statement of the cause of action, and formed a part of it.

It is contended that a party who has received a negotiable promissory note in payment of a debt due by account, and who has transferred the note cannot maintain a suit on the original cause of action. In the case of Harris vs. Johnson, 3 Cranch, 311, it was held that an action could not be maintained on an open account, conditionally paid by the receipt of a note, whilst the note was outstanding. This case seems to have been determined on the authority of Morgan vs. Kearslake, 5 Term Reports. The objection to the recovery under the circumstances, was, that if it were allowed, then the plaintiff might have double satisfaction. The presumption is, he received value for the note when he negotiated it, and to permit him to recover on the open account whilst the note was outstanding, would be the means of allowing him to receive payment twice for the same demand. We are of the opinion that the case now under consideration, does not fall within the principle of those above cited. There has been no legal transfer of the note. The legal title is still in Kingsland and Lightner, and the notes are brought into court, and made a part of the statement of the cause of action. The blank endorsement under the circumstances can only be regarded as a direction that Simonds, *et al*, should have the benefit of this suit. The fact that the notes were taken on the faith of the lien

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shows that the maker was disregarded in the transaction, and that it could not have been in the contemplation of the parties that any steps should have been taken by them in order to prevent the release of Kingsland & Lightner. The notes with the blank endorsement accompany the statement of the cause of action and form a part of it, and it is impossible to say that there is any danger that these notes will ever be used against Kingsland & Lightner.

These considerations answer the objection that the lien is personal and cannot be transferred.

TROTTER vs. THE BOARD OF PRESIDENT AND DIRECTORS OF ST. LOUIS PUBLIC SCHOOLS.

1. The first section of the act of Congress, of 13th June, 1812, disposes of all lots, which had been inhabited, cultivated, or possessed prior to Dec'r., 1803; and was intended only to settle claims, rights, or titles originating under the Spanish government.
2. The second section was intended to make a donation, and is not confined to the lots mentioned in the first section but reserves for schools, all the land embraced in the out-boundary directed to be run in the first section, and not rightfully owned or claimed by private individuals, or held as commons belonging to some town or village, or reserved for military purposes.
3. Under the second section, neither occupancy nor possession prior to Dec'r., 1803, is necessary to establish a town lot, or out-lot of a town.
4. A survey made by an officer authorized by law, is prima facie evidence, and cannot be questioned by a mere trespasser.

ERROR to St. Louis Court of Common Pleas.

J. SPALDING, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The right of the plaintiff below is limited and governed entirely by the words of the second section of the act of Congress, of 13th June, 1812, and is confined to "all towns or village lots, out-lots, or common field lots," included within an out-boundary line directed by that act, and not rightfully owned or claimed by any private individuals. 2 Story's Laws 1257, act of June, 1812; 3 Story's Laws 1972, act of

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May 26, 1824; 4 Story's Laws 220, act of January 27, 1831; act of General Assembly of Missouri, February 13, 1833, p. 37, incorporating board of trustees.

2. The lands reserved for the use of schools in the 2d section of the act of Congress of 13th June, 1812, is confined to what was either *a town or village lot, out-lot, or common field lot, before or at the transfer of the country to the United States.*

First, The words in the first section undoubtedly apply only to lots, as such, under the former government, and the words in the second section reserving for schools, are identically the same. 6 Mo. Rep. 292-3-4 and 297, Hammond vs. Board of Public Schools, 8 Mo. Rep.

Second, The scope and purview of all the acts of Congress relating to the lands and claims and donations, or confirmations of the same in Missouri, show that only those claims are meant which originated under a former government, French or Spanish; and if this reservation applies to others, it is a solitary instance in that branch of Congressional legislation.

Third, The phraseology of the act of 26th May, 1824, indicates that the lots reserved had a previous existence as "lots," and were not mere vacant ground, or space; see the words "so many of said vacant town lots," &c.

Fourth, An examination of the words in the 1st and 2d sections of act 13th June, 1812, shows that both the confirmation and reservation of lots applies only to *Spanish lots*. There could be no *town lots*, no *common field-lots*, but by Spanish authority. In the 2d section the words are in the alternative. 12 Peter's Rep. 350, Strother vs. Lucas.

Fifth, The words "out-lot" in the act of 13th June, 1812, as applied to St. Louis, adds nothing to the meaning of the act, as there were no "out-lots" other than the common fields; but as applied to several of the other villages enumerated in the act, it was necessary, because there were "out-lots," not common field-lots, at those villages. See record p. 41, Milburn's evidence; do. p. 43, Conway's evidence; do. p. 51, Brown's testimony. See the plats of Ste. Genevieve, and New Bourbon in the record, which are rural villages, and made up of large and frequently irregular lots, many of them called "out-lots."

Sixth, The situation of the villages of St. Charles and Carondelet, requiring the extension of village lots as the towns increased, to be made on the *commons*, accounts for the phraseology of the second section, or "held as commons belonging," &c.

Seventh, The letters of Penrose and Riddick, see 2d vol. Land Documents p. 376, show that "out lots" and "common field lots" are syn-

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onymous, and that *vacant pieces* of ground not designated as lots, were not intended by said act of Congress.

Eighth, The report of the old Board of Commissioners, 2 vol. Land Documents, p. 388 to 683. Report of Recorder acting in lieu of the board, vol. 3 Land Documents p. 274. It appears that the old board never call *common field lots*, *out lots*, but that the Recorder applies the two words to be the common field lots of St. Louis indiscriminately: but he did not apply the word "*out lot*" to any other piece of ground than common field lots at St. Louis.

3. If the reservation in the 2d section of the act of June 13th, 1812, embraces town or village lots, *out lots*, and common field lots, as they were at the date of that act, it is yet to be confirmed to the towns or villages properly so called, and does not refer to the limits of them as incorporated under the American government, and therefore does not include the ground in question.

First, Because the local legislature could include as much territory as it pleased in the town, and as the incorporation was the act of a court, Congress could not know the size, and would not have made a reservation thus in the dark.

Second, St. Louis as then incorporated, contained many square miles, lying in the neighborhood of the town proper, as the decree of the court and the survey show.

Third, In 1812, the town proper did not extend as far as the ground in question. See testimony of Moore, p. 37, of record, and of Rene Paul, p. 29.

4. The out-boundary line as required by the first section of the act of 13th June, 1812, would not embrace the ground in question. See the plats and the testimony of Milburn, &c.

First, The words of the act 1st section, requires the out-boundary lines to be run so as to embrace the villages and the *out lots*, *common field lots*, and *commons*, *thereto respectively belonging*. Such lots therefore to be embraced must belong to the village; a vacant unappropriated space of ground, *does not* and *did not* belong to the village of St. Louis; and the lot in question *did not* belong to it.

Second, But the "*common field lots*" did belong to their respective villages and so did the *commons* and "*out-lots*," in the instances where such commons and out lots existed. 12 Wheaton's Rep. 441, White's Compilation. These provisions for making new settlements were not observed here it seems; but the very minute enactments show that the Government only could make towns or lots, &c., and also when a town was made, it comprehended lands other than the village lots, &c.

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5. The act of incorporation of plaintiff divests the trust fund, and is therefore unconstitutional and void. Acts of session of November 1832, p. 37.

First, All free white persons as the city was then, or should be, are members of the corporation.

Second, The directors are to be chosen by all free white males residing in the city, as the same may be extended from time to time.

6. The jury were not *legal and impartial*. 3 Bacon's Abr. 756. Partiality of jurors, good cause of challenge. "If an action be brought by corporation," &c., 2 John. Rep. 194, Wood vs. Stoddard; it shows that inhabitants of a town were not proper jurors, in a suit the avails of which in part went to the support of the poor. 19 John. Rep. 121. This case shows how careful courts are, even at this day, that jurors shall be *omni exceptione major*. 2 Caines Rep. 133; at the close of the opinion, the court say "underwriters can hardly be proper jurors in cases in which persons pursuing the same business are parties. Jurors should be *omni exceptione major*. 7 Cranch 290, McQueen and Child vs. Heburn, showing at page 297, that jurors must be *omni exceptione majores*. 3 Black. Com. 363, as to Challenges, "*propter affectum*," &c.

HENRY S. GEYER, for defendant in error.

The decisions of the court of common pleas are maintained to be correct upon the state of facts presented by the record on the following grounds:

1. The reservation and subsequent relinquishment of lots were made for the benefit of the inhabitants then and future, of the town as it was in 1812, or as it was directed to be surveyed by the act of 13th June, 1812, and in either case the modern city is included; and whether the town contemplated by Congress was of greater or less extent, the power vested in the Legislature of the State to provide for the disposition of the lots reserved and relinquished by the act of Jan. 1831, committed to the Legislature the choice of trustees or agents, which power was rightfully exercised in the act incorporating the plaintiffs; consequently there is no valid objection to the right of the plaintiffs to recover any lot, duly set apart for the use of schools, within the out-boundaries of the survey directed by Congress, 2 Story 1257; 3d do. 1973; 4 do. 2220; acts 1832, p. 7.)

2. Whether the land in controversy is or is not within the reservation and relinquishment for the use of schools—it is not land, the sale

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of which ever was authorized by law, and therefore not subject to entry under a New Madrid certificate: the defendant is, consequently a mere trespasser claiming by possession only, and is not in a condition to controvert the propriety of the survey as made and returned, or any other official act of the officers of the United States, within the scope of their authority. See acts of Congress above cited, and act of Congress of 3d March, 1811, 2 Story 200, 17 Feb'y. 1815; 2 Story 1500; Geyer's Digest 484; Hunter vs. Hemphill, 5 Mo. Rep. 119.

3. Whether the defendant is or is not allowed to dispute the effect of the documents given in evidence—they were duly authenticated by the officers having custody of the originals, and the originals are the acts of officers entrusted by law with the authority to make them. They were pertinent to the matter in controversy, and were therefore competent evidence both by statute and upon general principles. If there was any thing in either of them irrelevant to the issue that ought to have been pointed out and distinctly objected to, but as the official acts of officers, performed within the scope of their authority, they were at least *prima facie* evidence. (Acts of Congress, 2 Story 1257; 3 do. 1973; 4 do. 2200; Rev. C. Mo. 251; 1 Starkie 156, 161; United States vs. Perchman, 7 Peters 53.)

4. It was the province of the court and not of the jury, to decide what the act of Congress required to be included, or excluded from the general survey of the town. If the question was at all open to enquiry whether the act of the officer to whom the duty was intrusted, had judged rightly in a matter confided exclusively to him, his judgment when not questioned by the United States, is not to be overruled by the opinion of a jury, and still less by the opinion of witness, who had not access to the information necessary to determine the question. It is not sufficient to invalidate the survey, that it might have been so run as to exclude the land in dispute, or include a greater extent of territory: either case involves the interpretation of an act of Congress which could not be referred to a jury. *Prima facie*, the survey includes all that it ought, and no more. This fact instead of being rendered doubtful by the evidence, is established by it, and therefore it was correctly held to be *prima facie* correct, and not invalidated by any evidence given. (See acts of Congress above referred to, and the survey, certificate and instructions in evidence. Hammon v. President, &c., St. Louis Public Schools; Janis v Gurno; 4 Mo. Rep. 458; Gurno vs. Janis, 6 do. 352; 8 do. 432-3-4-5 and 464; 9 do. 134, 734-5, and 12 do. 437-8, Hunter vs. Hemphill; U. S. vs. Perchman, and acts of Congress above cited, 6 Peters' 728.

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5. What constitutes a lot, within the meaning of the act of Congress, is a question of law, depending upon facts, as locality, boundaries, &c. and therefore the court could not be required to refer the whole question to the jury as was attempted in the first ten instructions. To constitute a lot within the reservation, it is not necessary that it should have been within the limits of the town during the Spanish or French governments, as assumed in the 4th instruction; it is sufficient that it is within the general survey of the town as directed by act of Congress; or that it should have been made a town, or village lot, out-lot or common field lot, previous to the 13th of June, 1802, by *proper authority*, as asserted in the 5th instruction; nor could the jury be authorized to decide the question of *authority*; nor did the acts of Congress declare that the land reserved, should be a common field lot, or embraced within the streets, or among the regular lots of the town, as assumed in the 8th and 10th instructions. The term "lot," has no technical meaning, but is used in the acts of Congress, in its common or popular sense, signifying a parcel of land, with defined limits, no matter what the form, or whether the boundaries have been designated for the particular land, or the surrounding lots, by grant or occupation; nor is it necessary that it should be in the common field. If the parcel of land so designated by metes and bounds, is embraced by the streets, or is among the regular village lots, it is a village lot, if not, it is an out-lot, though not a common field lot; and if vacant, and unappropriated on the 13th June, 1812, and not confirmed by the act of that date it is reserved for school and military purposes by the 2d section, unless held as commons; and this without regard to whether it had ever been granted, or set apart as a lot, to any person or persons. (Acts of Congress, 2 Story 1257; 3 do. 1973; 4 do. 2220; 1 Dougl. R. 30; 1 T. R. 53; 2 do. 387, 586; 4 M. & S. 210; 6 Bac. Abr. Statute I., 2, 7; Willis 397; 4 do. 30; Vasseur v. Benton, 1 Mo. Rep. 296; Salle alias Lajoy vs. Primm' 3 do. 534; 12 Peter's 453; Gurno vs. Janis, 6 Mo. Rep. 530; Lawless v. Newman, 5 Mo. Rep. 240.

NAPTON, J. delivered the opinion of the court.

This was an action of ejectment to recover a lot in the city of St. Louis, bounded east by Second street, south by Cherry street, west by Third street, and north by a lot or small tract of five or six acres, granted to J. Clamorgan, and surveyed in 1803.

The plaintiffs below recovered a judgment for a portion of said lot.

The title of the plaintiffs was derived from the act of Congress of

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June 13, 1812, making further provision for settling the claims to land in the territory of Missouri.

It appeared that in accordance with the act of the Territorial Legislature of 18th June, 1808, authorizing the incorporations of towns in certain cases the court of common pleas in the district of St. Louis, made an order dated 6th November, 1809, incorporating the town of St. Louis, and the lot sued for is within the corporate limits so defined. It was also embraced within the out boundary, made in pursuance of the act of 13th June, 1812, and the act of 26th May, 1824, purporting to be the out boundary line of St. Louis, so as to embrace the out-lots, common field lots in the common field of St. Louis, and the commons thereto belonging. In pursuance of instructions from the Commissioner of the General Land Office, dated 15th Jan'y, 1839, directing the surveyor to designate and set apart for the support of schools in the town of St. Louis, the vacant land lying between the survey of Clamorgan and Cherry street, the lot in dispute was so designated and set apart as directed. It appeared that the lots so designated and set apart had not been reserved for military purposes, and that they did not exceed one-twentieth part of the whole lands included in said survey.

The defendant offered as an outstanding title, a New Madrid location, made by the legal representatives of Henry Peyroux, which embraced the lot in controversy, as well as several lots south of Cherry street, and Spanish claims north of the town.

The defendant also, with a view to show that the lot in controversy was not within the limits of the Spanish town as it existed in 1803, offered various documents in evidence: 1. Clamorgan's claim and concession, and the survey of it by Soulard in 1803. This survey describes the claim as lying four arpens north of St. Louis, and bounded on the south by vacant lands adjoining the town. 2. An ancient plat derived from the former government, containing surveys of sundry grants lying north of Clamorgan, in which are laid down the position of the *half moon* and the *bastion*, and the lots south of Cherry street are described as the *first lots of the town*. 3, 4, 5, & 6. A plat of the town made by Auguste Chouteau in 1780; the petition of Pierre Chouteau and others, for the confirmation of the whole town in 1808, and of the proceedings of the Board thereon, recognizing said plat. 7. The concession to Chouteau in 1799, of 133 arpents, lying within the out-boundary line, as offered in evidence by plaintiff, and a plat of Chouteau's mill tract, containing 1300 arpents, and other tracts lying all within said out-boundary line.

The testimony of several surveyors and others, familiar with the old

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town or village of St. Louis, was introduced by the defendant, with a view to show the size and situation of St. Louis, at the time of the change of government.

The strip of land on which is situated the lot now claimed, lay between Clamorgan's grant and the first tier of lots as laid down in the ancient map of the town. In 1799, one Beauvois petitioned the Lieut. Governor for a part of this strip, describing the portion he desired as "situate to the north of the town, on the hill west of Main street, and bounded south by a cross street that separates it from the last lot of the town; on the north by the land granted to Clamorgan, &c., which space may contain about the ordinary lot of 120 feet front, by the accustomed depth of 300 feet," &c. The concession was made in November, 1803. East of Main street another portion of the strip was granted to Madame La Chaise. This location of Madame La Chaise was not surveyed, the surveyor stating that he did not know whether a street ought to be traced out in that portion of the town, and if so, on whose land the street ought to be traced, and therefore he had put the widow La Chaise in possession of the land lying between Clamorgan and Lacompte. The location is described in the Recorder's report as a lot in the town of St. Louis, and was confirmed as such, possession having been proven prior to 1803.

These same witnesses gave their opinion also, that the term "out-lot," used in the act of Congress 13th June, 1812, so far as it applies to St. Louis, means nothing other than common field lots; that the term is not found among the land records in St. Louis.

Some testimony was given in relation to the out boundary line as given in evidence; some of the witnesses being of the opinion that it did not embrace enough, as it left out the Barriere des Noyes and Grand Prairie common fields, which they supposed to be common fields belonging or appendant to St. Louis; others declaring that this out-boundary line might have been so run as to have embraced everything enumerated in the act of Congress, and have still left out the lot sued for.

These witnesses were or had been public surveyors.

The plaintiffs asked and the court gave two instructions to the jury, to wit:

"1. The official survey given in evidence by the plaintiff, purporting to be a survey made in pursuance of the act of Congress of 13th June 1812, is *prima facie* evidence of the out-boundaries of the town of St. Louis, surveyed so as to include the out lots, common field lots and commons thereto belonging.

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2. If the jury find from the evidence that the lot or parcel of land, designated by the survey numbered 3198, given in evidence in this case, is within the out-boundaries of the town of St. Louis, surveyed so as to include the out-lots, common field lots, and commons thereto belonging, and that before the commencement of this suit, the Surveyor of Public Lands, for the States of Illinois and Missouri, under the instructions of the Commissioner of the General Land Office, did survey, designate, and set apart to the said town, the said lot for the support of schools therein, then the plaintiffs have shown a sufficient title to said lot."

The defendant asked the following instructions, which were refused :

"1. If the jury believe from the evidence, that the land sued for in this action was not, nor any part thereof, a town lot, village lot, or common field lot, at the time the American Government took possession of the Upper Louisiana, they are bound to find for the defendant.

2. If the jury believe from the evidence that the land sued for in this action was not, nor any part thereof, either a town lot, village lot, out-lot, or common field lot, on the 20th Dec. 1803, they are bound to find for the defendant.

3. If the jury believe from the evidence, that the land in question in this suit, was beyond the limits of the town of St. Louis, as the same existed under the French and Spanish Governments, and that on the 13th June, 1812, it was not in whole nor in part a portion of the land inhabited, used or laid out for the purposes of said town, or its inhabitants, they are bound to find for the defendant.

4. If the jury believe from the evidence, that the land in question was, during the French and Spanish Governments, outside of the town of St. Louis, and was, down to the 13th June, 1812, an unappropriated and vacant space, beyond the regular limits of said town, they are bound to find for the defendant.

5. The act of Congress of the 13th June, 1812, entitled "an act making further provision for settling the claims to land in the territory of Missouri," does not reserve for the use of schools, in the towns and villages therein mentioned, any land which had not been made a town or village lot, out-lot, or common field lot, previously, *by the proper authority.*

6. If the jury believe from the evidence, that the survey of the out-boundary line of the town of St. Louis, under the first section of an act of June 13th, 1812, could have been so run as to include the out-lots, common field lots, and commons thereto belonging, and exclude

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the land in dispute in this action, they are bound to find for the defendant.

7. That the location under the New Madrid certificate, so called, in favor of Henry Peyroux, given in evidence in this case, is a better title to the land in question than that shown by the plaintiff, if the jury believe from the evidence that the said land is embraced in such location, and that it was not on the 13th June, 1812, or before, either a town or village lot, out-lot, or common field lot of St. Louis.

8. If the jury believe from the evidence that the land in question before, and on the 13th June, 1812, was a vacant space not embraced within the streets of St. Louis, nor included among the regular lots of the village, and that it had never been a common field lot, then the said act of Congress did not reserve it for the support of schools.

9. If the jury believe from the evidence, that the out-boundary line of the survey of St. Louis, under the act of Congress of the 13th June, 1812, given in evidence by the plaintiff, does not include all the common field lots belonging to St. Louis, then the same line has been illegally run, and is not evidence of title.

10. That the land in question was not reserved for the use of schools by the act of Congress of 13th June, 1812, although a vacant space lying within the limits of St. Louis, as incorporated by the court of common pleas, unless it were a town or village lot, out-lot, or common field lot, previously designated as such.

11. A mere vacant, unappropriated space of ground, outside of the village of St. Louis, as such village was on the 13th June, 1812, is not, of course, an out-lot within the meaning of that act, although lying within the limits of the town of St. Louis, as incorporated by the court of common pleas, by the order given in evidence, and although not a common field lot.

12. The boundary line of St. Louis, of the lots and commons thereof, given in evidence by the plaintiff, has not been run according to law, and therefore no evidence of title.

13. That the town or village lots, out-lots, or common field lots, reserved for the use of schools, by the act of 13th June 1812, and relinquished by the act of 29th January, 1831, to the inhabitants of the several villages therein mentioned, was a reservation to the use of the villages, as they stood under the French and Spanish Governments, and the act of the Legislature incorporating the plaintiffs, to be elected by the inhabitants of the city of St. Louis, as it stood incorporated at the passage of said act, is ineffectual to divest the trust fund from the ancient inhabitants of the village of St. Louis, to the modern city of St

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Louis; and the authority in the act authorizing the election of the board of directors, by others than the grantees, is null and void, and the plaintiffs have no legal existence, and cannot maintain this action.

14. The reservation by the acts of 1812 and 1831 aforesaid, to the use of the inhabitants of the villages named in the said act, was a reservation to the use of the inhabitants of the villages as they stood in 1812; and the act of the Legislature of Missouri, incorporating the plaintiffs as trustees for the use of the inhabitants of the modern city of St. Louis, is ineffectual to divert the trust to the use of such inhabitants, and the authority in said act to elect the board of directors of public schools, &c., for the modern city of St. Louis, is null and void, as diverting the objects of the grant, and the plaintiffs have no legal existence, and cannot maintain this action.

15. That the plaintiffs are not entitled to recover in this action, because the acts of Congress of 13th June, 1812, and January 1831, and the act of the Legislature of Missouri, incorporating the plaintiffs, have conferred no title on them, and they are not entitled to recover.

16. If the jury find from the evidence that the instructions from the General Land Office, under date of 15th January, 1839, accompanied with a diagram, B, referred to in said instructions, and designated on said diagram by the colors green and yellow, to survey and set apart the school lands, does not embrace the land in question, they must find for the defendant."

The merits of this case depend upon the construction of the first and second sections of the act of 13th June, 1812, which are as follows:

§ 1. *Be it enacted, &c.*, That the rights, titles, and claims to town or village lots, out lots, common field lots, and commons in, adjoining and belonging to, the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, Ste. Genevieve, New Madrid, New Bourbon, Little Prairie and Arkansas, in the Territory of Missouri, which lots have been inhabited, cultivated or possessed prior to the twentieth day of December, one thousand eight hundred and three, shall be, and the same are hereby, confirmed, to the inhabitants of the respective towns or villages aforesaid, according to their several right or rights in common thereto: *Provided*, That nothing herein contained shall be construed to affect the rights of any persons claiming the same lands, or any part thereof, whose claims have been confirmed by the board of commissioners for adjusting and settling claims to land in the said territory. And it shall be the duty of the principal deputy surveyor for the said territory, as soon as

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may be, to survey, or cause to be surveyed and marked, (where the same has not already been done according to law,) the out-boundary lines of the said several towns or villages, so as to include the out-lots, common field lots, and commons thereto respectively belonging. And he shall make out plats of the surveys, which he shall transmit to the surveyor general, who shall forward copies of the said plats to the Commissioner of the General Land Office, and to the Recorder of Land Titles: the expense of surveying the said out-boundary lines shall be paid by the United States, out of any moneys appropriated for surveying the public lands: *Provided*, That the whole expense shall not exceed three dollars for every mile that shall be actually surveyed and marked.

§ 2. That all town or village lots, out-lots, or common field lots, included in such surveys, which are not rightfully owned or claimed by any private individuals, or held as commons belonging to such towns or villages, or that the President of the United States may not think proper to reserve for military purposes, shall be, and the same are hereby reserved for the support of schools in the respective towns or villages aforesaid: *Provided*, That the whole quantity of land contained in the lots reserved for the support of schools in any one town or village, shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village.

For the purpose of enabling the Surveyor General to distinguish the lots claimed by individuals from those reserved under the 2d section above recited, the act of 26th of May, 1824, was passed. It enacts:

“§ 1. That it shall be the duty of the individual owners or claimants of town or village lots, out-lots and common field lots, in, adjoining or belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, St. Ferdinand, Villa a Robert, Carondelet, Ste. Genevieve, New Madrid, New Bourbon, Little Prairie and Arkansas, whose lots were confirmed by the act of Congress (13th June, 1812,) on the ground of inhabitation, cultivation or possession, prior to the 20th Dec. 1803, to proceed within eighteen months after the passage of this act, to designate their said lots by proving before the Recorder of Land Titles, the fact of such inhabitation, cultivation or possession, and the boundaries and extent of such claim, so as to enable the Surveyor General to distinguish the private from the vacant lots appertaining to the said towns and villages.”

“§ 2. That immediately after the expiration of said term allowed for proving such facts, (26th Nov. 1825,) it shall be the duty of the Surveyor General, within whose district such lots lie, to proceed under

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the instructions of the commissioner of the General Land Office, to survey, designate and set apart the said towns and villages respectively, so many of the said town or village lots, out lots and common-field lots, for the support of schools, in the said towns and villages respectively, as the President of the United States shall not before that time (26th November, 1825,) have reserved for military purposes not exceeding one-twentieth part of the whole lands included in the general survey of such town or village, according to the provisions of the second section of the above mentioned act of Congress."

This section also directs a survey of the commons, and provides, "that lots relinquished to the United States on account of damage done them by earthquakes, and in lieu of which, lands have been located elsewhere, shall neither be so designated, nor set apart, nor taken into the estimate of the quantity to which any town or village is entitled."

§ 3. This section requires the Recorder to issue a certificate of confirmation, and "that as soon as the said time shall have expired, he shall furnish the Surveyor General with a list of the lots so proved to have been inhabited, cultivated or possessed, to serve as his guide in distinguishing them from the vacant lots to be set apart as above described, and shall transmit a copy of said list to the commissioner of the General Land Office.

By the second section of the act of 27th January, 1831, the United States relinquished all their rights, title, &c., to the town and village lots, out-lots, and common field lots, in the State of Missouri, reserved for the support of schools in the respective towns and villages, by the second section of the act of 13th June, 1812.

The question is, what lands are reserved by the 2nd section of the act of 13th June, 1812? On the one side, it is contended that all the lands included within the general survey directed by the first section, which are not disposed of to private claimants, by said section, are reserved by the second, partly for military purposes, partly for schools as the subsequent legislation of Congress, or the action of the executive, might determine. On the other hand, the plaintiff in error insists, on a more rigid construction of the language of the act; he maintains that the same language being employed to designate the subject matter of legislation in both sections, the same construction must be given to the terms employed in one section that is given to the same terms in the other. Hence, it is insisted, that as the first section confirms to individuals village lots, out-lots, common field lots, only as they existed in 1803, the second section must be limited to the same subject matter,

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to wit: to *lots which had existence under the former government*. This construction, it is said, is not only warranted by the letter of the law, but is consistent with the general scope of Congressional legislation on this subject: the object of all the laws in relation to the settlement of land claims in Missouri, being uniformly confined to such as originated under the former government. This section, therefore, if it applies to anything that was not a lot, made so by grant, or user under the former government, must be a solitary exception to the general course of legislation. The apparently careful use of the word "lots," in both the first and second sections, and the repetition of the same terms in the supplementary acts of 1824 and 1831 is invoked as a circumstance confirmatory of this interpretation. Hence, the second section speaks of the "quantity of land *contained in the lots* reserved for the use of schools," &c.; and the act of 1824 directs the Surveyor General to set apart "*so many of the said vacant town or village lots*, out lots and common field lots," as the President shall not have reserved, for military purposes.

I cannot concur in this rigid interpretation of this act, but am led to a different conclusion, from a view of what seems to be the general scope and design of the law, as well as from the distinct and separate objects proposed by the two sections under consideration; and this conclusion, as I conceive, is not only warranted by its language, but is better supported by the history of its origin and purposes, as disclosed in the State papers, portions of which were read at the trial.

Congress designed to dispose of the whole subject matter about which they were legislating. When, therefore, they directed an out boundary line to be run, they obviously intended that survey to embrace all the particulars previously enumerated in the section, and it was as clearly designed that these particulars, to wit: the village lots, out-lots, common field lots, and commons, should comprehend everything within that line. Of what avail was this out-boundary line, unless everything within it was disposed of?

It will be observed that the first section had disposed of all the lots that had been "*inhabited, cultivated, or possessed, prior to 1803;*" that is, the whole of the Spanish village, or town proper. Then an out-boundary line was directed, and the second section disposes of all the lots, out lots, &c., within this out boundary, but without limiting them to such as had been "*occupied,*" &c., under the former government. Now, if it was the intention of Congress only to reserve the lots, out-lots, &c., which were enumerated in the first section, and acquired their character as such from occupancy or survey under the Spanish

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government, why direct that an out-boundry line shall be run? An enumeration of the particular classes of land, as it was made in the first section, would have answered every purpose, and no "useless investigation," as Mr. Riddick terms it, is saved by directing this line. The same questions arise under the second section, which did under the first; the same proof is necessary, and so far as the General Government, and the schools were concerned, they could get nothing by proof, except where such lots had been abandoned by their proprietors.

It is true that the second section embraces nothing which is not conveyed by the same terms in the first, except that the inhabitation, possession or cultivation required by the first section, is not required by the second; but these terms, if taken in their ordinary acceptance, are large enough to embrace every thing within the out-boundary line directed to be run. Hence, the word *out-lot* is interpreted as synonymous with common field lot, by those who would limit the operation of the second section to such lots as were recognized by the Spanish authorities. But the limitation of these words in the first section, is not to be found in the second.

But the motive and design of these two sections of the act of 1812, are totally different. The first section in conformity with the title of the act, was designed for the settlement of claims, rights and titles, originating under the former government; it was the fulfilment of an obligation imposed upon this Government, by their treaty with France; and its operation is confined to this object solely. The second section obviously grows out of different motives, and has in view different purposes. It was a mere gratuity so far as the donation for schools is concerned, and the reservation, in other respects, appears designed for the convenience of the Government. There is no reason why Congress, in making the reservation in the second section, should have been limited to Spanish claims or to lots which were recognized by the former government, as appurtenant to the village.

Whilst this intent of the law makers is to be inferred from the law itself, the letters of Mr. Riddick and Penrose, contained in the State Papers of that year, (Duff Green's ED. v. II. p. 377,) are calculated to strengthen this construction of the act.

In Mr. Penrose's letter to Mr. Gallatin he says "claims for field or out-lots, as they are termed, should be confirmed, recorded or not recorded. All these tracts have been cultivated and possessed from 15 to 50 years. All this class are, the Grand and Little Prairie and Barriere des Noyes St. Louis. There may be a few vacancies perhaps in these fields, grant them in such case to the inhabitants for

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public schools." Again he says: "It would probably be best to confirm the town, generally to the inhabitants, and if there be any vacant lots, grant them for public schools." Mr. Penrose evidently considers out-lots, and common field lots as synonymous.

Mr. Riddick's letter was addressed to the chairman of the committee on public lands, and is dated March 26th, 1812, "Class 49th," he says: "Villages, commons, common field, and lands adjacent, given to the inhabitants individually for cultivation, possessed prior to 20th December, 1803." On this class he remarks: "The 49th Class will comprise nearly one-fourth in number of all the claims in the Territory of Louisiana, and if confirmed at once, by the outer lines of a survey to be made by the principal deputy, would give general satisfaction, and save the United States a deal of useless investigation into subjects that are merely matters of individual dispute; the United States can claim no right over the same, except a few solitary village lots and inconsiderable vacant spots of little value, which might be given to the inhabitants for the use of schools."

These letters show that Congress was in possession of full information on the subject; and the act of 13th June, 1812, seems to be framed with great caution. Notwithstanding these vacancies within the out-boundary line suggested by Mr. Riddick, were represented as inconsiderable vacant spots of little value, they were not granted *en masse* to the schools, but were first subject to be appropriated by the President to military purposes, and after that object was accomplished, they were reserved for the use of schools; providing, however, that in no event should the portion appropriated to this latter purpose, exceed the one-twentieth of the whole land embraced by the out boundary.

It would be a little remarkable if Congress had exhibited all this circumspection in reserving for military purposes, and for the promotion of education, abandoned lots in the village, or vacancies in the common fields.

The ninth and twelfth instructions, asked by the plaintiff in error, call in question this legality of the survey given in evidence on the trial, purporting to be the out-boundary line of the town of St. Louis, as it stood incorporated on the 13th June, 1812, "including the out-lots, common field lots of the common field of St. Louis, and the common thereto belonging," and purporting to be made in pursuance of the first section of the act of 13th June, 1812.

Several objections are made to this survey, founded partly on the testimony given at the trial, consisting of the opinions of practical surveyors, and facts detailed by them, and partly upon matters appearing

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on the face of the survey. One objection is, that the survey does not comprehend the Big Prairie, and Barriere des Noyes common fields; another is, that the survey comprehends too much, and might have been made pursuant to law, leaving out several strips of ground now taken in. The first objection is certainly not available. If the United States and the corporation, (plaintiff below) are agreed upon this point, I am unable to see upon what principle the defendant should be permitted to object that the survey does not embrace all the land which it should have embraced. The survey having been made by an officer duly authorized by law, was therefore *prima facie* evidence of what it purported to be, and the defendant if permitted to contest it on this ground, would be occupying the position of a mere trespasser. The principle sanctioned by this court in Hunter vs. Hemphill, would, I think, preclude a party so situated from taking such an objection.

But the second objection rests on different grounds. If the survey embraced more than the act required, the rights of third persons originating subsequently to 1812, but before the actual making of the survey, might be materially affected. The out-boundary line directed by the act, was to embrace nothing except town or village lots, out-lots, common field lots, and commons, in, adjoining and belonging to the town of St. Louis, at the passage of the act. If it did, the defendant below had a right to show it; whether he is a trespasser or not depends on the legality of the survey. If the survey did not rightfully embrace the land in dispute, it was public land, and liable to sale and location; if it did, the land was not so liable, and the defendant's New Madrid location was a nullity. Whether the survey was inaccurate in this respect or not, is a mixed question of law and fact; so far as the question depends on the construction of the statute itself, it is a question of law; whether the lot in controversy was within the limits directed by the act, is a question of fact for the jury.

The first instruction given by the court of common pleas, at the instance of the plaintiff below, was a correct exposition of the law on this point. By the second instruction given, the jury were left to determine whether the lot in controversy was within the out-boundary of the town of St. Louis, surveyed so as to include the out lots, common field lots, and commons thereto belonging. This instruction either assumes that the survey of the out-boundaries given in evidence, was conclusive upon the defendant, or leaves its legality to be determined by the jury as a question of law. As the court rejected all instructions impeaching the validity of the survey, I presume the second instruction was intended to assert that principle, and therefore virtually directed

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the jury to find for the plaintiff, if the lot in controversy was within the surveyed out boundary which was in evidence.

Though I am not prepared with the evidence now before the court to say that this instruction was absolutely and abstractly correct, that is, that there may not be valid objections to this survey, yet so far as the present defendant is concerned, he cannot complain, if any survey made in conformity to the law, must have embraced the lot proved to have been occupied by him.

As before observed, I reject that interpretation of the law, which requires occupancy or cultivation prior to Dec. 1803, as essential proof to establish a town or out-lot of the town. What then was the condition of the strip of ground, numbered on the survey lot 3198, in 1812? It was surrounded on three sides by streets. On the east was a lot belonging to Madam Luchaire, and confirmed to her by the Recorder in 1815, as a village lot. On the west was the land of Beauvois, which in 1799 was described as "situate to the north of the town, on the hill west of Main street, and bounded south by a cross street, that separates it from the last lot of the town, on the north by the land of Clamorgan, &c., which space may contain about the ordinary lot of 120 feet front by the accustomed depth of 300 feet." This would seem to be a town lot, at least in contemplation, as early as 1799. The vacant space between these lots, must surely be held a town lot, within the meaning of the second section of the act of 1812.

The judgment of the court of common pleas should, in my opinion, be affirmed.

SCOTT, J. I concur in affirming the judgment on the main point in the cause.

TOMPKINS, J., dissenting.

This is an action of ejectment, prosecuted in the court of common pleas, by the Board, &c., against John Trotter. Judgment was there given for the plaintiffs, and to reverse it, Trotter prosecutes this writ of error.

It appears from the evidence in the bill of exceptions, that most of the jurors were residents of the city of St. Louis, and Trotter having objected to them on that account, his objection was overruled, and that he excepted to the decision of the court.

The plaintiffs offered in evidence a transcript of the record of the

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county court of St. Louis county, containing an order of that court made in November, 1809, incorporating the town of St. Louis, with certain limits therein mentioned. To the admission of this evidence the defendant objected, and his objections being overruled, excepted.

The plaintiffs then offered in evidence a plat and survey entitled a plat and description of the survey of the out-boundary lines of the town, now city of St. Louis, as it stood incorporated on the 13th June in the year 1812, including all the out-lots, common-field lots of the common field of St. Louis, and commons thereto belonging, made in pursuance of the act of Congress of 13th June, 1812, entitled an act making further provision for settling claims to land in the Territory of Missouri.

The defendant objected to the admission of this document in evidence; his objection was overruled, and he excepted, and it was agreed that this plat too might be read in evidence, being too large to be entered upon the bill of exceptions.

The plaintiff then gave in evidence a certified copy of certain instructions of the Commissioner of the General Land Office, of which a copy follows:

"GENERAL LAND OFFICE, }
January 15th, 1839. }

SIR:

I have received your report of the 19th September last, with the accompanying papers, in relation to the claims of the school commissioners to certain lands, under the acts of June, 1812; (Land Laws, p. 620,) and 26 May, 1824, (do. p. 884) in the city of St. Louis, for the support of schools.

The application in behalf of the School Commissioners is, that I will instruct the Surveyor General of Missouri, to designate and set apart for the support of schools in the town of St. Louis, all the vacant *ground* lying between the first line of the common field of the town of St. Louis, and the claims of Chouteau, Eglise, Yosti, Soulard, Clamorgan, and Third street; also any vacant land lying between the survey of Clamorgan and Cherry street south, extending from Cherry street south to the river, if it shall appear by the record of this office, and the records of the Recorder of Land Titles, that said grounds were vacant on the 13th June, 1812, provided the said grounds thus assigned do not exceed one-twentieth of the whole land thus included in the general survey of the town.

This ground is represented in green and yellow on the diagram B, accompanying your letter of 22d December, 1837, to the President and

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Directors of the Board of School Commissioners for the city of St. Louis, and also on the diagram D and F, transmitted with your report of the 19th of September last.

It appears that there was a military occupancy by the former government on a part of the ground (represented by a yellow shade on diagram B,) and that the tract claimed by the Commissioners is covered by the New Madrid location, (Cert 184,) in the name of Henry Peroux, under Francis Hamlin.

The position of the land in question on which there was a military occupancy, is not reserved for military purposes, as appears by the communication from the War Department, copies of which were transmitted to you on the 18th day of July last.

On a careful examination of this case, I am of opinion that the act of 13th June, 1812, has reference to the corporate limits of St. Louis, as they existed at the date of that act; the same having been established by a decree of the court of common pleas of the district of St. Louis, in 1809, and which are as presented on your diagram D by the lines *al l m*, *m n*, and thence up the river to *a*.

The tract in question, in the opinion of this office, not being the land the sale of which is authorized by law, Peroux's claim to it must be regarded as invalid, under the second section of the said act of 26th of May, 1824, making it the duty of the Surveyor General, within whose district such lots lie, to proceed under the instructions of the Commissioner of the General Land Office, to survey, designate, and set apart to the towns and villages mentioned in the act, so many of the vacant town or village lots, out-lots, and common field lots for the support of schools in the said towns and villages, as the President of the United States shall not before that time have reserved for military purposes; "not exceeding," however, one-twentieth part of the whole lands included in such town or village, &c. You are instructed to survey, designate and set apart for the support of schools in St. Louis, the portion of land now applied for, and return to this office an approved diagram of the same."

This letter purports to be signed by the Commissioner of the General Land Office, and addressed to the Surveyor General of Illinois and Missouri, at St. Louis.

The plaintiff then gave in evidence a certain diagram headed B, on which the space between Cherry street and Jaques Clamorgan, running from the Mississippi river, to the line of Third street, produced is colored in blue ink, and the space immediately west therefrom is in green and southwardly in yellow; then follows the diagram.

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The plaintiff then gave in evidence the plat and survey purporting to be the designation and setting apart of a lot or piece of ground for the support of schools, which is as follows, &c.

A witness then produced by the plaintiff, proved that the land sued for was within the limits designated by the Surveyor General, and that the defendant at the time of the commencement of this suit resided on the land sued for. The plaintiff then closed his evidence.

The defendant then gave in evidence several documents. But as I have not been able after a careful attention both to the oral and written argument, to perceive the relevancy of that evidence, I shall pass it without further notice at this time. But if I find it shall become necessary, I may hereafter detail so much thereof as may seem necessary to illustrate what I may say in this opinion, observing only, that the defendant claims by virtue of a location made under a certificate, dated 30th November, 1815, issued by Frederick Bates, then Recorder of Land Titles, stating that in conformity to the provisions of the act of Congress of the 17th February, 1815, the said Henry Peroux, or his legal representatives, is entitled to locate any quantity of land not exceeding one hundred and sixty acres, on any of the public lands of the Territory of Missouri, the sale of which is authorized by law. This location was made on the 7th day of April, 1817.

The defendant then examined several witnesses, the object of whose testimony appeared to be to prove what were the out-boundary lines of St. Louis, on the 13th day of June, 1812, and also the meaning of the words *lot*, and *out-lot*, as used in this act of 13th June, 1812, under which the plaintiffs claim, and the extent of the town in the year one thousand eight hundred and four, at the time of the change of government. The town of St. Louis had then only three streets parallel with the Mississippi river, of which the western was called Barn street, from the fact that the barns of the village were generally built along on the west side of that street. And it was also in evidence, that there was a considerable vacant space west of the said Third street, lying betwixt it and the common field fence, which was built along on the east ends of the common field lots.

The testimony being closed, the plaintiffs prayed the following instructions, to-wit:

1. The special survey given in evidence by the plaintiffs, purporting to be a survey made in pursuance to the act of Congress of the 13th June 1812, is prima facie evidence of the out-boundary lines of the town of St. Louis, surveyed so as to include the out-lots, common field lots, and commons thereto belonging.

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2. If the jury find from the evidence that the lot or parcel of ground designated by the survey numbered 3198, given in evidence in this case, is within the out-boundary lines of the town of St. Louis, so as to include the out-lots, common field lots, and commons thereto belonging, and before the commencement of this suit the Surveyor of Public Lands for Illinois and Missouri, under the instructions of the Commissioner of the General Land Office, did survey, designate and set apart to the said town, the said lot for the support of schools therein, then the plaintiff has shown a sufficient title to said lot.

To the giving of which the defendant objected, but the court gave them, to which action of the court, the defendant by his counsel excepted.

The defendant then prayed the court to give the jury sixteen instructions, of which I shall notice these following only, believing the others to be irrelevant or mere repetitions of such as I shall take occasion to observe on, for I do not wish to embarrass the case either with useless words or useless matter:

2. If the jury believe from the evidence that the land sued for in this action, was not, nor any part thereof, either a town lot or a village lot, out-lot, or common field lot, on the twentieth day of December, one thousand eight hundred and three, they are bound to find for the defendant.

5. That the act of Congress of 13th June, 1812, entitled an act making further provision for settling claims to land in the Territory of Missouri, does not reserve for the use of schools in the towns and villages therein mentioned, any land which had not been made a town or village lot, out-lot, or common field lot, previously, by the proper authority.

7. That the location under the New Madrid certificate, so called, in favor of Henry Peroux, or his legal representatives, given in evidence in this case, is a better title to the land in question, than that shown by the plaintiffs, if the jury believe from the evidence that the said land is embraced in such location, and that it was not on the 13th of June, 1812, or before, either a town or village lot, out-lot or common field lot of St. Louis.

8. If the jury believe from the evidence that the land in question before and on the 13th day of June, 1812, was a vacant space, and not embraced within the streets of St. Louis, nor included among the regular lots of the village, and that it had never been a common field lot, then the said act of Congress did not reserve it for the support of schools.

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10. That the land in question was not reserved for the use of schools by the said act of Congress of 13th June, 1812, although a vacant space lying within the limits of St. Louis, as incorporated by the court of common pleas, unless it were a town or village lot, out-lot, or common field lot, previously designated as such.

13, 14, 15. That the plaintiffs are not entitled to recover in this action, because the acts of Congress of 13th June, 1812, and of January, 1831, and the act of the Legislature of Missouri, incorporating the plaintiffs, have conferred no title on them.

These instructions were refused, and the defendant excepted. The verdict of the jury being found against the defendant, he moved for a new trial, for all the common place reasons, assigning also some particular reasons; as, that some of the jury were inhabitants of the old town of St. Louis, and others within the limits of the streets surveyed and marked out since the date of the act of 13th June, 1812, and that the act of the Missouri Legislature of 1832, p. 37, incorporating the plaintiffs below, defendant in error here, diverts the trust fund, and is therefore unconstitutional. I pass the point arising out of these three instructions, of which I have given a summary, without noticing them further.

If indeed the plaintiff in error be, as is contended, a mere trespasser, having acquired from the United States, under whom he claims, no color of title, then the selection and designation of lots for the support of schools in St. Louis, by the Surveyor General, under the direction of the Commissioner of the General Land Office, however inconsistently it may have been made with the letter, language, and spirit of the act of Congress of 13th June, 1812, cannot be invalidated by any act of this plaintiff in error. *Hunter vs. Hemphill*, 6 Mo. Rep. p. 106. In this case Hunter claimed the disputed land, under a certificate of purchase made to him by the Receiver of the Land Office at Palmyra. Hemphill, the defendant in the action, offered to prove that the land had not been advertised for sale. The court decided that the defendant had no right to question the regularity of the sale.

The plaintiff in error, as has been shown, claims the land in controversy, by virtue of a location made under the authority of a certificate issued by the Recorder of land titles, dated November 30th, 1815, stating that in conformity to the act of Congress of 17th January, 1815, Henry Peroux, or his legal representatives, is entitled to locate any quantity of land not exceeding one hundred and sixty acres, on any of the public lands in the Territory of Missouri, the sale of which is authorized by law. By the act of 3d March, 1811, Congress had au-

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thorized the President of the United States to direct so much of the public lands in the Territory of Louisiana to be surveyed and sold, as he might think proper; and by the act of 4th June, 1812, this Territory of Louisiana became the Territory of Missouri. The land then had been authorized to be sold, and the location on it was made on the 7th of April, 1817, more than twenty years before the same was designated and set apart for the support of schools by the Surveyor General, under the direction of the Commissioner of the General Land Office. It becomes then the duty of the defendant in error, to show that the land in controversy was either a town or village lot, out-lot, or common field lot, not rightfully owned or claimed by any private individual, for none other is reserved for the support of schools, by the 2d section of the act of 13th June, 1812.

In order to understand well the provisions of this second section, it is necessary to advert as well to the first section as to the title of the act. The act is entitled, "an act making further provisions for settling the claims to land in the Territory of Missouri. By this act Frederick Bates, late Recorder of land titles, had succeeded to all the powers and duties of the board of commissioners established by the act of 2d March, 1805, and through eight long sections, Congress steadily pursues their object, pointing out the duties of the Recorder in every case that could be anticipated.

The material part of the first section is as follows: "*Be it enacted, &c.*, that the rights, titles and claims, to town or village lots, out-lots, or common field lots, in, adjoining, and belonging to the several towns or villages of Portage des Sioux, St. Charles, St. Louis, &c., which have been inhabited, cultivated or possessed prior to the twentieth day of December, one thousand eight hundred and three, shall be and the same are hereby confirmed to the inhabitants of the respective towns, or villages aforesaid, according to their several right or rights in common thereto, *Provided, &c.*" The latter part of the section directs the surveying and marking of the out-boundary lines of the several towns or villages by the principal deputy surveyor, so as to include the out-lots, common field lots, and commons thereto respectively belonging. The second section provides that all town or village lots, out-lots, or common field lots, and commons included in the general survey, (above directed to be made,) which are not rightfully owned, or claimed by any private individuals, or held as commons belonging to such towns or villages, "that the President of the United States may not think proper to reserve for military purposes, shall be and the same are hereby reserved for the support of schools, in the respective towns or

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villages aforesaid: *Provided*, that the whole quantity of land contained in the lots reserved for the support of schools in any one town or village, shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village."

Nothing is given here but town or village lots, out-lots or common field lots; and to prevent too loose a construction of the granting part of the act, it is expressly provided, that the *land* contained in the *lots* reserved for the support of schools, in any one town or village, shall not exceed one-twentieth part of the whole *lands* included in the general survey of such town or village. Here the word *land* is twice used in contradistinction to the word *lot*, in the short space of three lines, as if to declare in so many words the belief of Congress that there might be included in this general survey of these towns or villages, as well as *land* not divided into *lots*; as *lots* already divided or marked out at the passage of the act, to wit: prior to the 20th day of December, 1803, since which time Congress did not recognize any authority in Missouri Territory to lay off lots in these towns or villages. If, then, the *land* contained in the lots *not rightfully* owned or claimed by any private individuals, should exceed one-twentieth part of the whole lands included in the general survey of such town or village, then only could so many lots be reserved, as amounted to one-twentieth part of the whole lands. On the contrary, if the land contained in all the lots not rightfully claimed, amounted to less than one-twentieth part of the whole lands included in the general survey, it is absurd to say that any other power than Congress can give the deficiency, and it is still more absurd to say that Congress intended to give what their language does not import. Their officer may give, and if he give nothing but their property, his act is valid, till they choose to annul it; but if he give what has been appropriated by another, his act is void. If, then, there be not lots, such as are directed to be reserved for the support of schools, in the second section, not rightfully owned or claimed by any private individuals, then Congress neither gave, nor intended to give any thing for the support of schools, in the town or village where none such were found. Had Congress intended to give one-twentieth part of the land contained in the general survey, the proper terms to express their meaning were at hand, and it could have been expressed in much fewer words. But this general survey was directed to be so made, as to include the out-lots, common field lots, and commons thereto belonging. If, then, these out-lots had no existence other than as land, no person could know when the survey did include them. It has been twice solemnly decided by this court, that an inhabitant of one of these

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villages, to get a lot under the 1st section, must prove the existence of his lot prior to the 20th day of December, 1803: *Lawless vs. Newman*, 5 Mo. Rep. 241. The point arose on an instruction given by the circuit court, all the judges being present and assenting. With this decision the cause was remanded, and a verdict found for Lawless, and the judgment of the circuit court affirmed. Judge Napton concurred in affirming the judgment of the circuit court, on the ground that there was no evidence on the record of so decisive a character, that Marli's enclosure was a village lot, as would require this court to set aside the verdict of the jury. Judge McGirk being indisposed did not sit. If the lots confirmed to the inhabitants, in consideration of habitation, cultivation or possession, must have had a legal existence prior to the 20th day of December, 1803, equally ought those lots not rightfully owned or claimed by any private individuals, to have had a legal existence before the 20th December, 1803. Indeed it is an absurdity in terms to call *land* a *lot* before it is divided. "The word *lot* in the United States," says Webster, "signifies a piece or division of land, perhaps originally assigned by drawing lots, but now any portion, piece or division of land." In this sense Congress used the words town or village lots, out-lots, &c. If not, then the direction given to the principal deputy to survey the out-boundary lines so as to include the out-lots, common field lots, and commons, means nothing. For if every thing included in the general survey, except the common field lots and commons, be intended by the word *out-lots*, then the principal deputy was at liberty to include the whole territory of Missouri, and then by the same liberal construction of the meaning of the word *out-lot*, one-twentieth part of the whole land would be intended to be reserved for the use of schools. But it is contended by the defendants in error, that if Congress intended by this second section, to give nothing but the land contained in the lots laid out under the authority of France or Spain, then they, the said defendants in error, will have nothing left for the support of schools; for, say they, there are no such lots left vacant in St. Louis; Congress, therefore, must have intended, say they, contrary to their express declaration, to give for the support of schools, not lots having a lawful existence under the preceding government, but one-twentieth part of the whole lands included in the general survey. For they further say, Congress had in the 14th sec. of the act of the 4th of June, 1812, providing for the government of the territory of Missouri, declared that schools, and the means of education, shall be encouraged and provided for from the public lands of the United States; and although Congress had made a most munificent provision from the public lands for the encouragement of education in the Territory general-

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ly, yet all the lands, near these enumerated villages, being appropriated to satisfy private claims, they would not be able to obtain their usual provision of the 16th section, and that this provision made in the second section for the support of schools in the several enumerated villages must be supposed to be a compensation for the loss of the sixteenth section.

Congress pledges its faith to the Territory of Missouri, to encourage and provide the means of education, and not to these villages enumerated in the first section of the act of 13th June, 1812. There is nothing, either in the title, or in the body of that act, to induce one to suppose that Congress in passing it, considered itself as redeeming a pledge made or given in the above mentioned 14th sec. of the act of 4th of June, 1812, the object of which is to provide for the government of the Territory of Missouri, whilst the object of the act of 13th of June, 1812, is to make further provision for settling claims to land in the Territory of Missouri. As above observed, it continues true to its object throughout the provisions of eight long sections; and so far was Congress from being affected with the knowledge that all the lands in the vicinity of these villages had been applied to satisfy private claims, that it appears from this act, that the public lands had not been then surveyed. For by the 5th section the principal deputy is directed to survey those to which the Indian had been extinguished. It moreover appears by this record, that there was in 1812, much vacant land near St. Louis.

The history of this act of 13th June, 1812, is so well known in St. Louis, that it is difficult to conceive how the defendants in error can be ignorant of it. As the material is on this record for other purposes, (which I am not able to appreciate,) I will give it: On the 30th day of June, 1808, four citizens of St. Louis, Pierre Chouteau, Bernard Pratte, — Hebert, and E. Yosti, filed with the Recorder of Land Titles, on behalf of the citizens of St. Louis, a claim for all lots, designated on a plat presented along with their claim. I suppose this claim filed, and the proceedings on it by the board of Commissioners, was intended as some evidence of the out boundary lines of St. Louis, which, as I conceive, are quite immaterial, so far as the plaintiff in error is concerned.

The thirtieth day of June, 1808, was the last day allowed for filing claims, to be adjudicated on by that board. The copy of the proceedings shows that Penrose voted for the confirmation of the whole: Bates and Lucas voted against it: Judge Lucas giving at large some very sensible reasons for his vote. Penrose, the said commissioner, and Riddick, the clerk to the Board, bore the report of that Board to Washington City in 1812, and remained in Washington City till the last of

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March, at least. While they were there, Mr. Penrose addressed a very long letter on the subject of these claims yet unsettled, to Mr. Galatin, then Secretary of the Treasury, and Mr. Riddick another to Mr. Morrow, Chairman of the Committee of Public Lands. Both these letters are agreed to be considered as on the record. I copied into my opinion in the case of Hammond vs. the same defendants in error, so much of them as is material here. See page 85 of the 8th vol. Mo. Rep. A plain man who would read these extracts on the 85th page above cited, could not fail to see in them the origin of the two first sections of this act of 13th June, 1812. But when we connect with these extracts, the claims filed on the 30th July, 1808, as above mentioned, and when we consider the proceedings of the Board on these claims, the conclusion is almost irresistible, that Chouteau, Pratte, and others filed their claims at the suggestion of Penrose and Riddick. Both these letters of Penrose and Riddick were communicated to the House of Representatives. Penrose's was dated 20th March, 1812, and Riddick's the 26th March of the same year.

So negligent were those inhabitants in proving up their claims, that the act of 26th May, 1824, was afterwards passed to allow them further time for filing their claims.

A lot, in the sense in which the word has been here used by Congress, is a piece, or division of land, marked out by authority of law, prior to the 20th day of December, 1803, for since that time, and prior to the passage of the act of 13th June, 1812, the Congress of the United States recognized no power west of the Mississippi, authorized to lay out lots in the Territory.

The defendants in error then, having no right according to the express language of the second section above cited, to receive for the support of schools, any land but what is contained in a town or village lot, an out-lot, or common field lot, it is quite immaterial to the plaintiff in error, what were the out-boundary lines intended by this act to be assigned to St. Louis. It is also immaterial to the merits of this case, whether according to Stoddard and Breckinridge, the French inhabitants at and near the Fort de Chartres, first came to St. Louis in the spring of the year 1766, then well knowing the French territory west of the Mississippi to have been transferred to Spain, and found it already inhabited, the survey of the town having been quite accurately made in the year 1764, by Pierre La Clede, Maxan and Company, (in pursuance of an order of the crown of France made before the cession, as will very readily be believed by every body a little acquainted with the history of the French settlements in North America,) or whe-

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ther those French inhabitants, according to the defendants in error, after the arrival of Count O'Reilly in 1769, at New Orleans, removed to the place where St. Louis now is, still believing the country to belong to France, because they did not desire to be transferred to the British Crown, and by conventional arrangements among themselves, made their settlements in the form of a village, leaving vacant spaces at convenient distances for streets. A lot, in the sense in which Congress uses the word, is still a piece or division of land, that had at the time of the passage of the act, a legal existence; and if at the time of the passage of the act it legally existed, it must also have legally existed prior to the 20th day of December, 1803. The defendants in error, on the 29th page of their printed argument, say, truly, that the word *lot* has no technical signification. But in the sense in which it is here used, it must have received a form from the hand of some person authorized to give it that construction.

Thus much being said, I will proceed to examine the instructions given and refused, premising that Congress by the act of 26th May, 1824, and 27th January, 1831, gave nothing more than had been given by the act of 1812, nor could they give it, to the detriment of the plaintiff in error.

To the first instruction asked by the defendant in error, there is no objection to be made; but to me it appears that a question about the out-boundary lines, could scarcely arise, unless the United States were a party, and no exception appears to be taken.

The second instruction assumes the whole ground, that every piece of land included within the out-boundary lines, is such a lot as is designed to be reserved for the support of schools.

In the beginning it is modestly called a lot, or parcel of ground, then it is called absolutely a lot, and the court is prayed to tell the jury, that if they find that the surveyor did survey, designate and set apart to the said town, the said lot for the support of schools, the plaintiffs have shown a sufficient title. It has been sufficiently shown that no lots could have been given by Congress, except such as had a legal existence prior to the 20th day of December, 1803, unless we commit such an outrage on the plain and obvious meaning of the language of Congress in the second or granting section, as to call all the land included in the out-boundary lines of the general survey, either a town or village lot, out-lot, or common field lot, while the same section contemplates the existence of land undivided, and of lots within that survey, as when it is provided that the whole quantity of *land* contained in the lots, reserved for the support of schools, shall not exceed one-

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twentieth part of the whole land included in the general survey, where the word *land* is twice used in contradistinction to the word *lot*, manifestly showing that Congress did not consider all the land included in the general survey as lots. Should it be found upon proper investigation that the corporation of St. Louis, since the occupation of the country by the United States, (whether before or after the passage of this act, is immaterial,) themselves surveyed and marked out these streets, bounding this lot, then it can by no means be called such a lot, as Congress intended to reserve for the support of schools.

The defendants in error, by way of illustrating their case, stated in their oral argument, that they occupied and held in peace a lot which lay in the south-eastern intersection of Market street, produced in the year 1816, and Fourth street, which was laid out in the same year by private individuals. It is in evidence in this case, and has been in several kindred cases, that there was at the change of government, much vacant land betwixt Third street and the space of ground now occupied by Fourth street. Some of this ground lying in the intersection of Market and Fourth streets, both as aforesaid made by private persons, they claim as a lot, and thus their own trespass is cited as an authority to regulate the decisions of this court. Many trespassers have taken timber off the land of the United States, in Missouri, but none, I hope, have yet claimed the right to take the timber of private individuals, because they had not been punished for taking that of the United States.

The second instruction appears to me to be greatly erroneous.

The second and fifth instructions prayed by the defendant below, plaintiff in error, ought to have been given for the same reasons that the second asked by the plaintiff below, defendant in error, ought to have been refused. Congress gave nothing but lots for the support of schools, and after the 20th day of December, 1803, there existed no authority to lay out lots in St. Louis, consequently every lot given by the act must have had a legal existence before the transfer of the Territory to the United States. Had Congress intended to give for the support of schools in St. Louis, any land not divided into lots, that instruction might and would have been expressed in terms plain and simple. They had only to say that they gave for the support of schools, one-twentieth part of the land contained in the general survey of the town or village. But they chose rather to say, they gave lots not right-fully owned or claimed by any private individuals, with a proviso that the land contained in these lots should not exceed one-twentieth part

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of the whole lands contained in the general survey. These two instructions should clearly have been given.

The seventh instruction ought to have been given. The eighth instruction might, I believe, with safety have been given, but as the merits of the case might well have been examined on the other instructions, the eighth might well have been omitted. This act of 13th June, 1812, was most manifestly framed, or at least the two first sections of it were framed on the letters of Penrose and Riddick, referred to in *Hammond vs. the defendant's* in error; and although Congress, as is contended, had other sources of information, yet it is hard to conceive that they had any as good and convenient—Judge Lucas and Mr. Bates, the two other commissioners, being presumed to be at home. Penrose calls them out-lots, or field lots, (as they are termed,) and says all those tracts have been cultivated from 15 to 50 years, p. 85 of 8th vol. The late Judge Ladue understood them to be synonymous terms. He had resided in St. Louis from 1799, and had been till the transfer of the country, Private Secretary to the last Lieutenant Governor, and till his death a few years since, was officially connected with the records of land titles. See his testimony in the bill of exceptions, in the case of *Newman vs. Lawless*, on file in the office of the clerk of the supreme court. Mr. Paul, the city surveyor, who in 1816, ran out this Fourth street above mentioned, and laid out the addition to St. Louis, in 1816, entertained the same opinion; his testimony is found on the same record with that of Judge Ladue above mentioned. It is true there were other out-lots, as mill lots and barn lots, but as every inhabitant would not want a mill or barn, these it may be presumed, were conceded only on special request, and were not marked out to lie vacant till some demandant appeared; and it has never yet appeared that any of these lots have been cultivated from fifteen to fifty years. Penrose says, the out-lots, or field lots, (as they are termed,) had been. The eighth instruction might with propriety have been refused, for if it can be shown that there were other out-lots than common field lots vacant, that is, not rightfully owned or claimed by private individuals, then they have a right to take them for the support of schools, till they acquire a portion of land not exceeding one-twentieth part of the whole lands included in the general survey of the town.

The tenth instruction is unexceptionable and should have been given.

The eleventh instruction is a mere echo of the tenth. The other five instructions asked by the plaintiff in error, do not, in my opinion, merit attention.

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I feel myself justified in saying that this was the cotemporaneous construction given to that act. In 1812, the best informed men might well believe that some lots would be found within the general survey of St. Louis, not rightfully owned, or claimed by any private individuals. For most of those claims were not asserted till after the passage of the act of 1812, and many not till after that of 26th May, 1824. Mr. Penrose, in his letter above referred to, after recommending the confirmation of the out-lots, or field lots, as he says they are termed, says "there may be a few vacancies," perhaps in those fields, and advises that they be given to the inhabitants for public schools. Mr. Riddick says:—"The United States can claim no right over the same, except a few solitary village lots, and inconsiderable vacant spots, which might be given to the inhabitants for public schools."

Congress thought proper to give for the support of schools, the "vacant lots," that is, the lots not rightfully owned or claimed by any private individuals; but they give neither the "few vacancies" of Penrose, nor "the inconsiderable vacant spots" of Riddick. These men lived long afterwards at St. Louis, rich and influential, deeply interested in its prosperity, and never did they use their influence to appropriate these "few vacancies," or "inconsiderable vacant spots," for the support of schools. The evidences of their zeal in behalf of the public schools, we have seen in the extracts from their letters.

Again, on the 30th January, 1817, an act of the Missouri Legislature, by which seven of the most respectable citizens of the town or village of St. Louis, were appointed to take in charge "all the lands and other property which hath, or may be given by Congress, to said town for the support of schools, and appropriate the same," &c. I speak now from my own knowledge of what I saw, and of what I acted a part, for I suppose the Journals are all burnt in the State House, and feel assured that no man will deny a word that I say, although most of the actors are removed from this life. At the commencement of the session of 1818, the last session of the Territorial Government, an eminent young lawyer, representing St. Louis county, and residing in the village, introduced a bill to repeal the law. Never has St. Louis been more ably represented, and fortunate will she be, if in a century to come she shall be more ably represented. The late Judge Laduc was a member, than whom, not even one of the first Board of Commissioners to settle and adjust claims to land, knew more of these claims.

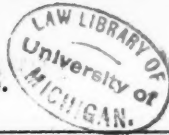
Not one of this able representation, though four of them lived in the village, stirred to prevent the repeal of this act.

Unfortunately for the success of the introducer of the bill, he had

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undertaken too much. His bill was framed with a view to repeal this act, and another act passed also, at the same session of 1817, that is, "An act to encourage the killing of wolves, panthers and wild cats." This the frontier members considered as officious intermeddling in their own peculiar business. The members from the Boonslick country, then first represented in the legislative body, rose as one man, and calling on all those in like situation, caused the bill to be rejected at the first reading. It is necessary to say that this young lawyer yet lives, and by a long train of services in the legislative body, has shown himself to be amongst the ablest, if not absolutely the ablest, man in the State. At that last session, Mr. Riddick was a distinguished member of the Council, and he, like the representation in the House, made no more efforts in behalf of the supposed interests of the public schools, knowing well, I suppose, that they had no shadow of claim, under the act of 13th June, 1812. About that time, perhaps while the last Territorial Assembly was sitting, the jailor of St. Louis county claimed the right of pre-emption in the purchase of all the vacant land lying betwixt Third and Fourth streets, and I know that it was the opinion of the late Judge McGirk, that he was entitled to it. At that time I was well acquainted in St. Louis, and had been so for nine years previous, and though on the occasion of the passage of this act of 1817, I had heard much against the claim of the public schools, I cannot charge my memory with one word said in their favor; and the act of 30th January, 1817, had become so much a dead letter, that when in the argument of the case of Hammond vs. the same defendants in error, Mr. Spalding intimated that the defendants had forfeited their right by a non user. Mr. Bates, who lived in St. Louis at the passage of that law, answered that they could not use it, because the Legislature had conferred on them no power. It was reserved, in my opinion, for the ingenuity of these latter days, to find out that the word *out-lot* means any piece of vacant land that lay within the general survey. The defendants in error have attributed to the late Mr. Hempstead the introduction of the convenient word *out lot* in the act of 13th June, 1812, to whom both in the oral argument of this case, and in that of Hammond vs. the same defendants, they gave a seat in Congress for the purpose of framing the bill, and so laudably zealous were they in the cause of education, that they did not at first perceive that the law was passed the session before Missouri had a delegate in Congress. But the blunder perceived was easily corrected, by sending Mr. H. to Congress on private business. If Mr. Hempstead had been on that occasion at Washington City, it is not probable that the chairman of the committee on Public Lands would have



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required him to write the bill in preference to Penrose, the late commissioner, or Riddick, the clerk to the board; since either of these last understood the subject much better than Mr. Hempstead's professional labors allowed him to do it, and certainly both Penrose and Riddick were as capable of writing as was Mr. H. Mr. Hempstead left behind him a high character for openness and plain dealing. Had he written the second section of this act, under which the defendants in error claim this land, with a view to give them land whether divided into lots or not, he would have stated in plain terms, that one twentieth part of the land contained in the general survey shall be reserved for the support of schools. But Mr. Hempstead was most probably at home attending to his extensive professional business, and the law must be construed as if it were framed by some plain man, who was accustomed to use words in their popular sense.

But it is said by the defendants in error, "the President of the United States can select no land for military purposes, within the survey under the act, except such as in the absence of such selection would be set apart for the use of schools; that the President did reserve a vacant space of ground on the south, and on that lot the United States Magazine is erected." It was not, nobody pretends it ever was a village lot, or common field lot, or that it was ever surveyed, or marked, granted to, or inhabited, cultivated or possessed by any person; yet it was reserved by the President under the second section." I cannot say that the President reserved that lot under the second section, as I know nothing either of him, or of the reason of his acts, except through the laws of the United States. But most assuredly the Executive of the United States has reserved land for military purposes wherever he pleased, without the aid of the second section of the act of the 13th June, 1812. In the case of *Wilcox vs. Jackson*, 13 Peters, p. 498, it was decided that the President may reserve for military purposes any lands of the United States; and as he speaks through the heads of Departments, a reservation of land made at the request of the Secretary of War for the purposes of his department, must be considered as made by the President of the United States. Nor did I ever consider the second section as containing a grant of power to reserve lots for military purposes, but as the recognition of a power already existing, which the Congress by the second section declared its intention not to withdraw in favor of the several towns or villages. However that may be, Congress by the act of 27th January, 1831, relinquished to these several towns or villages, all the right, title, and interest of the United States in and to the town or village lots, &c.; evidently showing that

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they did not conceive that the President of the United States either had taken, or would take anything liable to be selected for the support of schools. But suppose for a moment, that the President of the United States had declared in express terms, that he took possession of this piece of ground for military purposes under the second section of this act; is the action of a mere executive, or ministerial officer, however high, to furnish a rule of decision to this or any other court of record? It is to me a novel doctrine. But here it is sought to make the President of the United States an authority not only to this court for the law of the case, but to the jury for the finding of the facts, that such a piece of land as he is said to have selected for military purposes, is an out-lot of St. Louis, for the support of schools under the second section. If our courts gain ground as fast as the defendants in error we shall soon, in imitation of the courts of the Roman civil law, write to the President of the United States for his exposition of the law, as any new case arises.

The second section gives for the support of schools, all town or village lots, out-lots, or common field lots, not rightfully owned or claimed by any private individual, and which the President of the United States may not think proper to retain for military purposes, provided that the whole quantity of land contained in the lots reserved for the support of schools, shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village. The Commissioner of the General Land Office taking on himself the responsibility of changing the language of Congress, directs the Surveyor General to survey, designate, and set apart for the support of schools in St. Louis, not the vacant town or village lots, out-lots, and common-field lots, as the law directs, but "the portion of land now applied for" by the defendants in error, that is to say, all the vacant ground lying between the front line of the common fields of the town of St. Louis and the claims of Chouteau, Eglize, Yosti, Soulard and Clamorgan, and Third street, also any vacant land lying between the survey of Clamorgan and Cherry street south, &c. That is to say, Congress gives lots, and their agent drawing all his authority from their act, gives land. All this, as before observed, would furnish the complainant no ground of complaint, but would be a subject matter of correction to the General Government only, if the plaintiff in error had acquired no right to the disputed land. But if the language of the act of Congress is to prevail over his version of it, then in my opinion, he has transcended his powers. Of this, however, it is the right and duty of the Supreme Court of the United States to decide ultimately. Nothing

is more clear, however, than that Congress uses the word *land* and *lot* in different senses; and had they intended to give one twentieth part of the land contained in the general survey, they had no occasion to say anything about giving town or village lots, out-lots, or common field lots. "The word lot," says Webster and the Encyclopædia Americana, "is an *Americanism*. It may be large or small, according to the subject matter of discourse." An American historian might well say that the peace of 1763, when the French North American possessions were divided betwixt England and Spain, that that portion west of the Mississippi, became the *lot* of Spain. But without a strange perversion of language, the Commissioner of the General Land Office could not say that that portion of the land contained in the general survey, which was neither town, nor village lot, or common field lot, and which, of course had not been divided, was either an out-lot or out-lots; if so, then the Commissioner had nothing to do but direct the out-boundary lines of the town to be extended to the limits of the State, and then all the State would become an out-lot or out-lots of St. Louis, and at his pleasure he might designate, &c., for the support of schools in St. Louis, one hundred sections of the best cultivated land in the western counties, with as much propriety as he could the vacant land betwixt Third and Fourth streets, above mentioned. It is true this land was not on the 13th June, 1812, divided into sections, and the vacant land above mentioned, between Third and Fourth streets was also not divided into lots at that time. As a matter of general history, the one fact is as well known as the other, and the court of original jurisdiction has, at the instance of the defendant in error, precluded the plaintiff in error from leaving it to the jury, to find whether the land in controversy, was at the passage of the act, or what is equivalent before the change of government, such a piece of land as could, according to the popular meaning of the words, be granted for the support of schools, by the terms towns or village lot, out-lot, common field lot, in, adjoining, or belonging to St. Louis, assuming the ground that Congress used all this circumspection of town or village lot, out-lot, or common field lot, to mean nothing more than vacant ground, having a definite boundary; and as all the vacant land lying in the territory has a definite boundary, then, the term out-lot must include all that vacant land.

According to the same construction, the term out-lot must equally mean so much of the vacant land as it may please the Commissioner of the General Land Office to direct to be included in the general survey. But the popular meaning of the word *out-lot*, and common

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sense construction, tell us that the out-lot, and the other lots mentioned in the act, require those lots to have a location defined by metes and bounds, so that they can be distinguished, and included within the lines of a general survey, and no more land be included in that general survey than what is found to be contained in the lots and vacancies, if any, that may be found betwixt them. These vacancies, if any, we have seen from the proviso to the second section, are distinguished from the lots, where it is said the whole quantity of land contained in the lots reserved for the support of schools in any one town or village, shall not exceed one-twentieth part of the whole lands included in the general survey of such town or village.

In this last sentence as before observed, Congress has twice used the word *land* in contradistinction to the word *lot*, to show us that every piece of land having a definite boundary, does necessarily become such a town or village lot, out-lot, or common field lot, as to authorize the Surveyor to reserve it for the support of schools in St. Louis.

The second instruction asked by the defendant in error, was wrongfully given, and of those asked by the plaintiff in error, the second, fifth, seventh and tenth, were in my opinion wrongfully refused; and for this reason it is my opinion the judgment of the court of common pleas ought to be reversed.

P. S. Since the above opinion was written, the following account of the origin of St. Louis has been found:

"The city of St. Louis, was founded in the year 1764, by Monsieur Laclede, one of the partners in a mercantile association, known under the name of Laclede, Liguette, Maxan, and Company, to whom the Director General of the Province of Louisiana, had granted the exclusive privilege of trading with the Indians of the Missouri, and those west of the Mississippi above the Missouri, as far up as the river St. Peter. The traffic in furs and peltries with these distant tribes, though of great value, would have been unavailable without a suitable place of deposite of merchandize; and to induce the company to hazard the establishment of such a depot, which would serve as the nucleus of new settlements west of the Mississippi, extensive powers were given to the gentlemen engaged in this enterprise." Laclede it seems in August 1762, left New Orleans to view the river as far as the mouth of the

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Missouri; and concluding that Ste. Genevieve, where there was already a small settlement, was too far below the mouth of the Missouri, he commenced, on the 15th of February, 1764, the work of cutting down trees, and laying out a town, which he called St. Louis, "*after the reigning King of France.*" Hall's Sketches of the West, vol. 1, part 2, ch. 2, p. 165. All escape then from construing the word "out-lot" in its ordinary acceptations is hopeless. For here is a grant to this company by the Director or Governor General, in whom alone the power to grant land resided, both under the French and Spanish rule, till 1798, when it was transferred to the Intendant General of the Province, where it remained as long as Louisiana belonged to Spain. 2 vol. Land Laws M. S. p. 530, from No. 2, to No. 14, ending on p. 552 of said volume.

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1. Instructions should not be so given as to leave a jury to conjecture their meaning, when that meaning is contrary to their obvious import.
2. The law will not imply a promise to pay for an act which is of no benefit to a party.

APPEAL from Platte Circuit Court.

HICKMAN AND JONES, for Appellants.

The following are the points relied on by the appellants to reverse the judgment in this case:

1st. The damages are excessive, the verdict is against the weight of evidence, and the circuit court ought to have granted a new trial. See 4 vol. Mo. Reports 80.

2d. This suit is brought by Brooks & Kavanaugh, against Medlin & Anderson, and the testimony, (if it proves any thing,) proves a contract between Brooks on the one part, and Medlin on the other, without any partnership being shown, and therefore the judgment ought to be reversed. See 1 Chitty 31, 34; 2d vol. Mo. Rep. 54; 1st J. J. Mar. 205, 2d J. J. Mar. 38.

3d. The circuit court erred in giving the instructions asked by the

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plaintiffs, and in refusing to give the 3d instruction asked by the defendants, 4 vol. Mo. Rep. 44: C. Mon. 612.

4th. That the work was not performed by the plaintiffs according to contract, and therefore they were not entitled to recover. 4 Mo. Rep. 44, 46, 483; 3 vol. Mo. Rep. 166, 168.

5th. That the plaintiffs could only recover on a special count, and as the evidence varied from all the special counts, they were not entitled to recover on their declaration. See 6 vol. Mo. Rep. 30, and authorities cited.

6th. That an agreement to pay an additional price for the same work mentioned in the contract, is *nudum pactum*. 2. Saund. Pl. Ev. p. 502; Chitty on Contracts, 161.

7th. That the plaintiffs could not recover on an implied contract, when there was an express contract in force. 3 vol. Mo. Rep. 254, 7 vol. Mo. Rep. 433.

8th. That the contract could only be discharged by performance or discharge under seal. 6th vol. Mo. Rep. 510.

THOMAS AND BALDWIN, for Appellees.

POINTS AND AUTHORITIES.

1st. The court did not err in striking out the 3rd plea of defendants. If it be considered an answer to the action at all, it amounts to the general issue; gives no color; is argumentative; and it was in the discretion of the court to set aside or strike it out. Vide Step. plea. side page 420-'21, Com. Dig. 6 vol. 119, *et passim*. It is obviously no answer to the action, and any issue joined thereon would have been altogether indecisive of the matter in controversy. Kyle vs. Hoyl, 6 Mo. Rep. 545.

2d. The court did not err in overruling defendants motion to strike out the 1st, 2d, 3d and 4th counts in plaintiffs declaration. In this particular instance, defendants had no right to such a motion. They had filed their general demurrer to the declaration, which was overruled by the court and virtually withdrawn, by pleading to the action; vide 6 Mo. Rep. 174, Sweney vs. Welling, same Dickens *et al.* vs. Mullikin, 177. The same matters which are alledged, and many matters which could probably be alledged in such motion as grounds, were, as they are all, substantial defects, decided, or will be presumed to have been decided by the court under the general demurrer. Must the court suffer itself to be harrassed and insulted by repeatedly raising the same

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questions in the face of its solemn decision? Defendants should have excepted to overruling the demurrer. The objections made against the declaration in defendant's motion, are entirely without foundation. The 3d and 4th counts contain a statement of the contract and consideration according to its legal effect, without any notice of the variations, and aver performance specifically and entirely. The time for the completion, it is true, is stated to be in the spring of 1841, but that is the contract and the evidence supports it. The first count states that as cut stone was demanded by the commissioner instead of neatly hammered stone, plaintiffs stopped the work; and defendants promised if they would go on and complete the work of cut stone, they should be paid therefor what it was reasonably worth. Here is obviously a consideration. Different and better work is to be done than the contract called for. The time for the completion was fixed, and the substitution of piers for walls made by the agreement of the parties. In the second count, it is stated that the plaintiffs threw up and stopped the work, and afterwards went on and completed it under an agreement that they should be paid for the best side hammered work what it was reasonably worth. The plaintiffs had a right to stop the work, subjecting themselves to such damages as defendants should show themselves entitled to; and then going on afterwards to do the work upon the faith of the new promise, is unquestionably a sufficient consideration at this day. Vide 2 Lett. Rep. 170, Wilkins vs. Duncan; Sugd. on Vend. 158-'9, note 81, and cases there cited; Lattimore *et al.* vs. Haisen, 14 John. R. 330; Dearborn vs. Cross, 7 Cow. 48; Fleming vs. Gilbert, 3 John. R. 358; Keating vs. Price, 1 J. Cas. 22; Edwin vs. Saunders, 1 Cow. 250; 3d Am. Ed. Chitt. on Contracts, 27-'8, note ‡, and Monroe vs. Perkins, there cited; 9 Pickering, 298.

3. There was no demurrer to 3d plea of defendants, and there are no traces of any upon the record.

4. The court did not err in giving the instruction asked for by the plaintiffs.

5. The court did not err in giving the 2d instruction asked for by the plaintiffs. Vide 2 Star. Ev. side page 55-'6; 3 Monroe 404, Cochran vs. Tatum; 1 Chitt. Plea. 382-'3 and notes, and cases there cited.

6. The court did not err in giving the 3d instruction asked for by plaintiffs. The language of this instruction may appear on first glance liable to criticism. Probably it would have been more strictly accurate in relation to work of this kind, and in this particular instance to have been, if the jury believe from the testimony, that the work was completed by plaintiffs, with the exception of the two piers, and defendants

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consented to, or acquiesced in their not being put up, then, &c. But the former mode of expression is substantially the same; would convey the same idea to the jury, and be more readily understood by them. It is the custom in common parlance, to speak of the acceptance of buildings, curing defects in their execution, when nothing more or less is meant than a consent thereto, or an acquiescence therein by the employer. This instruction is substantially correct, and in connection with the others given to the jury, sufficiently explicit. Vide cases before cited, 2d ed. Stor. on Bail, 287-'8; 4 Mo. R. Fageur vs. Meredith, 538.

7. The court did not err in giving the 4th instruction asked for by plaintiffs.

8. The court did not err in giving the 5th instruction asked for by plaintiffs. Vide 2 Am. Ed. Chitt. Cont. side page 169 † note; 2 Star. Ev. p. 57; Story Bail 288; 3 Harrison Ind. 2273 and cases there cited; 2 Ed. Story Bail 287, note 4 and cases there cited.

9. The court did not err in giving the 6th instruction asked for by the plaintiffs. Vide 2 Litt. R. 170, and cases in connection cited above.

10. The court did not err in giving the 7th instruction asked for by the plaintiffs.

11. That the court did not err in refusing the 3d instruction asked for by the defendants, is obvious, inasmuch as it requires an express agreement to vary the original contract. Vide cases before cited.

12. The court properly overruled the defendants' motions in arrest, and for a new trial. The only question worthy of notice at all, arising upon this record, is whether the verdict is not against the evidence; whether there is any evidence conducing to show that plaintiffs erected the two small piers,—or to show an excuse for not erecting them. The erection of the piers by Medlin, was in reality an erection of them by plaintiffs. He hired a hand for that purpose that had been in plaintiffs employ. Defendants settled with plaintiffs, and paid them what the original contract called for. No objection is made about the piers. The extra face work was the only matter of controversy. It is but a rational conclusion that the expense of putting up the piers was charged to plaintiff's account, and deducted from their pay. The evidence shows an acceptance of, in other words an acquiescence in, plaintiffs default in putting up the piers. The money is paid for all but the extra face work, which constituted the matter of difference between them. But again, defendants prevented plaintiffs from putting up their piers and completing the work, by hiring others to put them up, when plaintiffs had ample time for that purpose. When the law has been fairly

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before the jury—the defendants instruction given—some of them in the teeth of the law, and when it appears that justice has been done between the parties, it must be a flagrant case that would justify the supreme court in setting aside the verdict of a jury affirmed by the court below.

Scott, J., delivered the opinion of the court.

This was an action of assumpsit, brought by Brooks and Kavanaugh, against Medlin and Anderson, in which the plaintiffs recovered \$212, 12 1-2 damages. After an unsuccessful application for a new trial, the defendants brought the cause here by appeal.

Medlin and Anderson, the defendants below, contracted with the county of Platte to build the foundation of a court house for said county: it was agreed that the work should be done with stone; and the face of the wall entirely around the house neatly hammered, and placed in the alternate ranges, of one thickness, as near as the quality of the stone would permit. Medlin & Anderson underlet the contract to Brooks & Kavanaugh, they stipulating to perform the work with the exception of the steps and door-sills, in conformity to the conditions of a bond executed by Medlin & Anderson to the county of Platte, for the performance of the same. It does not appear expressly although it may be inferred, that Brooks & Kavanaugh undertook the work at the same price that Medlin & Anderson were entitled to receive for the same from the county of Platte. After the work had progressed apace, the superintendent of the county interfered, and told the undertakers that the stone they had dressed for corners would hardly do for ashlers, and those they had dressed for ashlers would not do at all. Brooks & Kavanaugh complained to the superintendent that he exacted better work than they had undertaken to do. The superintendent advised them to abandon the work, as it could not be done for the price at which it was undertaken. Kavanaugh, when he informed the superintendent that the county court had intimated that he should have additional compensation, was advised by that officer not to look to that source for relief. A witness testified that he assisted in the performance of the work: while so employed the superintendent informed one of the plaintiffs (Brooks) that he would not receive the work unless it should be better done than even the corners had been. The corners were built of cut stone; some of the stone was hammered and shown to the superintendent, and he declared he would not receive it if it were put up; the stone shown to the superintendent was

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neatly hammered. Brooks then directed the witness to quit work, that his contract did not require him to do the work in the manner required by the superintendent, and that it could not be done as required, for the price at which it was undertaken. The witness ceased work accordingly, and informed Medlin, one of the defendants, that he had done so in consequence of the command of Brooks, who communicated to Medlin the cause of his abandoning the undertaking. Medlin requested the witness to hold on, that he would go and see Kavanaugh, another of the plaintiffs; he returned in a short time, and directed the witness and another workman to go on and do the work, as it had been done before they were interrupted by Brooks. Witness heard Medlin say to Brooks, at the time he was directed to go on with the work, that he would recover pay for the extra work, or he would spend the last ox he had. Kavanaugh circulated for the purpose of obtaining signatures, a petition to the county court, for additional compensation. Some evidence was introduced conducing to show that there was a difference between hammered and cut stone, the latter being more costly than the former, requiring more time and labor. Others denied that there was any difference, and were of opinion that the work performed by the plaintiffs would not be considered as neatly hammered work.

The controversy seems to have arisen from a difference in opinion among mechanics, as to what constituted hammered and cut stone work. The plaintiffs paid to defendants the contract price for the work.

The court, on motion, struck out the third plea of the defendants, which in substance, set up for the defence, that the several causes of action in the declaration mentioned, accrued to the plaintiffs for the work and labor, care and diligence of the said plaintiffs, in and about the building of a certain court house for the county of Platte.

Amongst other instructions given at the instance of the plaintiffs, were the following:

If the jury find from the testimony that the work was received by the defendants in execution and discharge of the agreement, they must find for the plaintiffs.

If they find there was additional, and better work than the contract called for, with the knowledge and consent of the defendants, and with the knowledge that the same would cost more than the contract price, and without any special agreement what should be paid therefor, plaintiffs are entitled for such work what it is reasonably worth.

As to the propriety of the action of the court in striking out the

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third plea of the defendants, it cannot be maintained that the plea was a sufficient bar to the action. The plea would clearly have been bad on demurrer. It is only to be regretted that the court permitted so anomalous a mode to be employed, in order to get rid of it. When the defect in the plea is such, that it cannot be reached by a demurrer, the court should not suffer a party to avail himself of it, by a motion to strike out. Such a practice was pointedly condemned by this court in the case of Snowden vs. McDaniel, 7 Mo. Rep. 313; its inconvenience and departure from principle were then exposed, and it is to be hoped that such a practice will not longer be tolerated. We cannot but admire the patience of that court, that would permit counsel a second time to raise objections to a plea, by a motion to strike out, after the same objections had been disposed of on a demurrer. This court has held, that after a demurrer to a declaration has been overruled, a motion in arrest of judgment for a defect in the declaration would not lie. So we suppose that after a demurrer to a plea is overruled, the court will not suffer its sufficiency to be again questioned, by a motion to strike out. That a court permitted this to be done, would not be error; but we remark upon it, because it is a departure from all correct practice, encumbers the record with useless matter, and causes unnecessary delay in the administration of justice.

As the evidence was not very clear, and the jurors were the proper judges of its weight, the court would have been loth to interfere with the verdict rendered in this cause, could it be satisfied that it was not induced by the erroneous instructions of the circuit court. The propriety of some of the instructions cannot be maintained. The jury was instructed that if they believe from the testimony in the cause that the work was received by the defendants in execution and discharge of the agreement, they must find for the plaintiffs. It is only necessary to state the proposition in connexion with the facts preserved in the record, in order to its refutation. The defendants paid the plaintiffs the agreed price for the work. The controversy was respecting additional compensation; and because the work was received by those for whom it was intended, the instruction assumes as a consequence, that the plaintiffs promised to give additional compensation, although they had given all that they had received themselves, and had no other interest in the matter, than that their liability to the county should be discharged. Surely if the instruction contained the law, the defendants may have an action against the county, and recover the amount, to the payment of which, they have been subjected by this action.

There is nothing in the record to qualify this instruction. The other

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instructions do not remove the objection arising from the generality of its terms. If it be said that it was given to meet the objection, that the work was not done in time, this does not appear from any thing contained in the other instructions. Instructions should not be so given, as to leave the jury to conjecture their meaning, when that meaning is contrary to their obvious import.

The second instruction above set forth, is not freed from objections. If it is considered in connection with the fact that the plaintiffs undertook to perform the work, in the same manner that the defendants had stipulated to do it, where is the equity or justice in subjecting them to the charge for additional compensation, without a promise, express or implied. The law, under the circumstances, will not imply a promise by them. It was no benefit to them. They were under no obligation to do it. The condition of their bond would not have been violated by an omission to do the work, for the instruction assumes that it was additional or extra work. If it was such, Medlin & Anderson were under no obligation to perform it. A promise to pay for the work might have, with greater propriety, been implied against the superintendent. It was done with his consent, and with a knowledge that it would cost more than the contract price. Why not as well raise a promise against him, for it was through him, that the injustice, if any, was done. Implied promises are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. Is it a dictate of reason or justice, that the plaintiffs should pay for the additional work, when it was in no manner of benefit to them, and when they were under no obligation to do it?

Judgment reversed.

HARRIS vs. WOODY.

1. In an action for charging a party with swearing a lie, there must be a *colloquium*, shewing that the testimony referred to, would, if false, constitute perjury.
2. In such case, it is necessary to prove a trial, and that the testimony given was material to the issue tried.
3. It is the province of the court to determine upon the legal effect of testimony, and an instruction, that admitting the testimony to be true, the plaintiff cannot recover, it is in the nature of a demurrer to evidence, and may well be given.

Harris vs. Woody.

APPEAL from Greene Circuit Court.

PHELPS, for appellant.

POINTS AND AUTHORITIES.

1. The court erred in instructing the jury. The instructions directed the jury to find for the defendant. *Hughes vs. Ellison*, 5 Mo. Rep. 112.

Error in court to instruct that the evidence is not sufficient. *La-beaume vs. Dozier, et al.* 1 Mo. Rep. 618.

Error to give an instruction which takes the case from the jury. *Morton vs. Reed*, 6 Mo. Rep. 64. *Berry vs. Dryden*, 7 Ib. 224.

2. That upon the evidence, plaintiff was entitled to recover. The words as laid in the declaration were proven; and the obvious import of the language is, to impute to plaintiff the crime of perjury. The declaration avers the words to have been spoken of the testimony given by plaintiff in a trial between Maryfield & Gwinne. The testimony was that the words were spoken of the testimony in a trial between Maryfield & Gwinne, or Woody & Gwinne: this is no variance. *Hibbler vs. Servoss*, 6 Mo. Rep. 24.

3. That the court erred in entertaining a motion to instruct the jury, before defendant had announced he had closed his case.

WINSTON, for appellee.

The points relied on by the defendant to sustain the judgment below, are:

1. That as the words proved to have been spoken were not actionable of themselves, but could only be made so by referring to some judicial proceedings, in which the plaintiff had given evidence, it was necessary not only to prove that the defendant had spoken the words in reference to the plaintiff's swearing, but that the plaintiff's swearing had been about a matter material to the issue. See 20 *Johnson's Rep.* 344; 12 *Wendell*, 500, 50; 14 *Wendell*, 120; 1 *Wendell*, 476; 1 *Cain's R.* 347; 13 *J. R.* 81, 48, 68; 2 *J. R.* 10; 6 *J. R.* 10; 6 *J. R.* 82.

2. The first count in the declaration was defective and bad, because it did not state, that on the trial of the cause, about which the words were spoken, the plaintiff had given evidence material to the issue; and as the evidence given, was only applicable to that count, the court did right in excluding it from the jury; because if the jury had given a verdict for the plaintiff on that count, the judgment ought to have been arrested.

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3. That the words charged in the first count, and proved on the trial, were not actionable *per se*, I presume is too clear for argument.

Scott, J. delivered the opinion of the court.

This was an action of slander in the Greene Circuit Court, instituted by Harris against Woody, in which Woody obtained judgment, from which Harris has appealed to this court.

The declaration contained three counts: the first alleges that there was a suit pending in the justices' court, in which the plaintiff was sworn as a witness; and that the defendant, speaking of the testimony given by the plaintiff on the trial of the said cause, said he had sworn a lie, or a damned lie, and could prove it. There is no allegation in this count, that the matter sworn to by the plaintiff on the trial, was material to the issue. The other counts charge, that the defendant said that the plaintiff had committed perjury. There was no evidence in support of these counts. On the trial in the circuit court, the words charged in the first count were proved to have been spoken by the defendant, but there was no evidence of the materiality of the plaintiff's testimony to the issue tried in the justices' court, nor was there any evidence of any trial having ever been had in the justices' court. After the plaintiff had closed his case, the defendant moved the court to instruct the jury, that admitting the evidence given by the plaintiff to be true, yet he cannot recover, which instruction the court gave.

It is well settled, that to charge a person with swearing a lie, without a colloquium shewing that the false oath was made under such circumstances as would constitute perjury, is not actionable. Bacon, title Slander, letter B; Mahan vs. Berry, 5 Mo. Rep; Palmer vs. Hunter, 8 Mo. Rep. In this last case it was held, that a declaration deficient in these respects, would be good after verdict, on the presumption that a court would not permit a party to take a verdict without proof of all circumstances necessary to entitle him to a recovery. The case now under consideration, differs from that of Palmer vs. Hunter, in this, that the objection is made before the verdict. The plaintiff having submitted his cause, and having offered no evidence of the pendency of a suit in the justices' court, and none of the materiality of the matter sworn to by the plaintiff on trial, we are of opinion the court properly gave the instruction asked for by the defendant.

The objections that the court by the instruction which was given, took the trial from the jury and usurped its province, is not sustained by the cases of Hughes vs. Ellison, 5 Mo. Rep. 112; Labeaume vs.

Harper vs. Baker.

Dozier *et al*, 1 Mo. Rep. 618, and others, cited by the plaintiff. These were cases in which the courts undertook to direct the jury as to matters of fact; but the instruction complained of does not intermeddle with the facts, but simply pronounces the law arising on the evidence introduced and admitted, to be true. The instruction was in the nature of a demurrer to the evidence.

We cannot see any force in the point that the court gave the instruction at the instance of the defendant, before he announced that he had closed his defence. The plaintiff had closed his case, and the defendant was at liberty to take his own course. He had a right to ask instruction, without saying he had closed. The refusal of his instructions might have rendered it necessary to introduce evidence on his part. Such a course contributes to the despatch of business, and shortens a trial, that might otherwise be unnecessarily prolonged. This is a matter of practice, so entirely in the discretion of the Circuit Court, that it would be extremely inconvenient for this court to interfere. *Rucker vs. Edding*, 7 Mo. Rep. 115.

Judgment affirmed.

HARPER vs. BAKER.

1. An improper refusal of a justice to grant a continuance, is no ground to dismiss a suit upon an appeal to the Circuit Court.
2. Upon an appeal to the Circuit Court, the trial is to be had *de novo*, and no act of the justice can be assigned for error.
3. When a justice improperly refuses to grant a continuance, an application to the Circuit Court for a mandamus is the proper course.
4. Making a writ returnable to a day not the regular law day of the justice, is not a ground to dismiss the suit.

ERROR to Montgomery Circuit Court.

Scorr, J., delivered the opinion of the court.

This was an action commenced in a justices' court, by J. & S. Baker, against Harper. At the return of the summons it appears that

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Harper made his appearance, and pleaded that the day named in the summons was not the regular day for holding the courts of the justice, and secondly that the notes sued on were not justly due. The transcript further shows that there was a demurrer to these pleas, which was overruled, and thereupon judgment was entered by the justice against Harper. Upon an appeal to the circuit court, a motion was made to dismiss the cause for the following reasons: That the justice gave judgment at the return term, and refused to continue the cause, although the defendant appeared, and pleaded; that the circuit court had no jurisdiction of the case, there having been no trial on the merits in the justices' court, and that the return of the summons was not made to the regular law day of the justice.

This motion was overruled, and judgment being rendered for the plaintiffs, Harper has brought the cause to this court.

The act of January 16th, 1843, directs that after issues shall have been made up, the suits shall stand continued until the second term. The same rule as to continuance and trials, are made applicable to suits in justices' courts. A supplementary act provides, that a written plea shall not be necessary to entitle a party to a continuance of course, in a justices' court.

Admitting that an improper refusal to grant a continuance in the circuit court, would be error for which this court would reverse a judgment, yet it does not follow that a refusal to grant a continuance in a justices' court would be error, or a reason why the cause should be dismissed from the circuit court upon an appeal. When a cause is taken to the circuit court by appeal from the justices' court, the powers of the circuit court are not limited merely to a correction of the errors committed by the justice, but there is a trial *de novo*, as though there had been no trial in the court below, and consequently no act committed by the justice can be assigned for error in the circuit court.

The error, if any, will be remedied by the circuit court on a trial *de novo*, and although errors may have been committed, it will be no cause for dismissing the suit.

It may be enquired, if a justice wilfully refuse to grant a continuance, when one is demanded under the statute, is the party without redress? But why should a plaintiff be mulcted in costs for the error or obstinacy of the justice, if a continuance is improperly refused? Why should the plaintiff have his suit dismissed at his costs, when it does not appear that he is consenting to the conduct, or demanding a trial or judgment when it is rendered?

If a party to a suit in a justices' court, would avail himself of the

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advantage conferred by the statute, it is obvious that an appeal to the circuit court is not the proper mode to obtain it. An application to the circuit court for the exercise of the superintending power with which it is entrusted, would seem to be the course warranted by the principles and usages of law.

There is nothing in the point, that the circuit court had no jurisdiction of the case, for the reason that there had been no trial on the merits in the justices' court. If the party had not a trial on the merits in the justices' court, he might have obtained one in the circuit court. An appeal is allowed for that very purpose. Nor can we see how the question relative to the propriety of the conduct of the justice, in making the writ returnable, and trying the cause on a day, not his regular law day, can arise under a motion for a dismissal. The courts cannot judicially notice what particular day in each month is appointed by the justice for his law day. When one is appointed it may be changed for another. What is the regular law day of a justice, is a question of fact and not of law; and if a party would avail himself of such an objection, it should be proved on the trial like any other fact, or perhaps advantage of the irregularity might have been had by an exercise of the superintending control of the circuit court.

Judgment affirmed.

TETHEROW vs. GRUNDY COUNTY COURT.

1. A writ of error will not lie from an order of a county court, appointing commissioners to locate a permanent Seat of Justice of a county.
2. If in such cases, the county court proceed illegally, the only remedy is by an application to the circuit court for a mandamus.

ERROR to Grundy Circuit Court.

Scorr, J. delivered the opinion of the court.

Commissioners were appointed by the General Assembly of this State, to select a seat of justice for Grundy county, under an act entitled, "an act for organizing counties hereafter established," approved December

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9, 1836. In pursuance of an act, the commissioners appointed, made a selection, and reported their proceedings to the circuit court of Grundy county, on the 5th day of August, 1841, which was approved by the court. This report was dated 24th of May, 1841. On the 20th day of June, 1841, a petition for the removal of the seat of justice thus selected, signed by the requisite number of taxable inhabitants, was presented to the county court of Grundy county, under the act entitled, "an act to provide for the removal of county seats," approved February 6th, 1835. This petition was dated May 19, 1841, but recited that the county seat had been selected by the commissioners appointed by the General Assembly. The court thereupon, in pursuance of the last recited act, appointed commissioners to locate permanently the seat of justice of Grundy county, who in conformity to law, selected a permanent seat of justice for said county, and reported to the county court on the 7th day of August, 1841. The circuit court also approved the proceedings of the last board of commissioners. On the 13th Sept., 1841, George Tetherow, a resident householder of Grundy county, moved the county court of said county to rescind the order of the 20th day of June, 1841, appointing commissioners to locate the permanent seat of justice for said county, on the ground that at the time said order was entered, no seat of justice had been selected by the commissioners appointed by the General Assembly. This motion was overruled, and a writ of error was sued out from the circuit court to reverse the proceedings of the county court; the circuit court affirmed the order of the county court, and the cause is brought to this court by writ of error.

The first question that arises on the foregoing statement of facts, is whether a writ of error will lie or not? Is George Tetherow such a party as is entitled to the writ? Is this a civil suit within the meaning of the 20th section of the 4th article of the act regulating the practice at law, which allows either party to except to the opinion of the court, in any *civil suit depending*, in any court of record; or is it within the 7th section of the last article of said act, which allows every person aggrieved by any final judgment or decision an appeal, or within the three first sections of the act entitled, "an act to regulate the practice in the supreme court." These statutes when construed in reference to the principles of the common law, as they must be, afford no support to the opinion that a writ of error can be sustained in this case. By the common law no person can bring a writ of error, unless he is party or privy to the record, or is prejudiced by the judgment, and therefore receives advantage by the reversal of it: the rule being, that a writ of

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error can only be brought by him who would have the thing, if the erroneous judgment had not been given. 2 Saunders 46 (a.) If a judgment is obtained against a lessee for life, the reversioner or remainderman, if immediate, may have a writ of error: so by the common law since the statute *de donis*, error may be brought by the reversioner, or remainderman, immediately expectant upon an estate tail. It is also a settled rule that the writ must be brought in the name of all the parties against whom any judgment is given, that it may agree with the record; for if a judgment is against several, if one alone should be permitted to bring error, every defendant may bring error, and so the plaintiff may be delayed a long time; therefore, if a writ is brought by one or more of the defendants, it may be quashed.

Let it be borne in mind, that the statutes concerning the selection and removal of county seats, are entirely silent respecting appeals and writs of error. Neither of these modes of reversing the proceedings of the county courts under those statutes is allowed to any person. A party who would sue out such a writ then, must look to the statutes above cited, and the common law, for a support to his proceedings. If the principles above stated are those which regulate the issuance of writs of error, of which there can be no doubt, how is it possible for the plaintiff in error to sustain his course? Is he a party to the record? Does it appear that he is aggrieved by the order of the court? Is he the only person aggrieved? Are all the rest of the people of the county satisfied with the proceedings, and must they be reversed for him alone, against their will? If they are dissatisfied, should they not be made parties; for dissatisfaction with the order, seems to be the only ground on which any person can base his right to a writ of error. If Tetherow is entitled to a writ of error, is not every taxable inhabitant of the county entitled to one, and when will there be an end of this litigation?

It is clear that the judgment upon which error is brought, must be final, and not merely interlocutory. With what propriety can it be said that the order appointing commissioners to locate a county seat permanently is a final judgment? So far from being the last, it is the first step in the proceeding. The order may remain and yet the county seat be never removed, the title to the place selected may be defective, or the people may never sanction the location. These considerations are sufficient to show that the law never could have contemplated that a writ of error should lie in such proceedings as the present.

Another objection to sustaining this case is, that the evidence is not preserved in the bill of exceptions. The bill only contains the action

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of the court in overruling the motion to rescind the order, nor is the evidence preserved in the bill of exceptions taken in the county court.

It may be asked if the county courts act in a lawless manner in removing county seats, is there no mode known to the law by which they can be restrained? The circuit courts have a superintending control over the county courts, and if they exceed their powers, or act contrary to their duty in proceedings on which writs of error will not lie, there are modes by which they can be restrained in conformity to the usages and principles of law.

We feel little reluctance in taking this course with the cause, for the objection to the proceedings of the county court, if they have any weight in them, about which we express no opinion, seems entirely technical, and have no foundation in justice.

Writ of error dismissed.

MINERVA JONES, ET AL, vs. THOMAS TALBOT AND MARY FOX.

1. Plaintiff claimed under a sale by execution issued on a judgment rendered June 25th, 1835. Defendant, under a sale made under a decree rendered June 11th, 1835, on a bill to set aside a deed of trust as fraudulent and void, bearing date 3d April, 1832, conveying the land in dispute. Held: That the record of the judgment, and decree for the sale of the land, is conclusive evidence that such proceedings were had, and of all the consequences thereof, and are not *res inter alios acta*, although plaintiffs were no party to the suit.
2. The title of the purchaser under the decree, is not affected by fraud in making the deed, to set aside by the decree.
3. Nor would such title in an innocent purchaser, be affected by fraud and collusion in obtaining the decree, he not being a party thereto.

APPEAL from Warren Circuit Court.

Wells, for Appellants.

Leonard & Todd, for Appellees.

POINTS AND AUTHORITIES.

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1. The decree and sale thereunder, divested the title to the land out of Talbot, and vested it in the purchaser at that sale, and the transcript of the record of these judicial proceedings was evidence against all the world of the fact of the proceedings, and of all the legal consequences of that fact. 1 Greenleaf's Ev. secs. 538, 539. 3 Phillips' Ev. (Cowen & Hill's edition,) 1821 & 1822, and cases cited.

2. The fact offered to be proved by the plaintiffs, that the deed of trust which was the foundation of the decree, was made to defraud creditors, and that the person from whose judgment the plaintiff's title was derived, was a creditor of the maker of that deed at the time it was made, does not avoid the title of the purchaser under that decree.

SCOTT, J., delivered the opinion of the court.

This was an action of ejectment, brought by the plaintiffs in error against the defendants, to recover the tract of land in the declaration mentioned, in which the plaintiffs submitted to a non-suit, which the court, on motion for that purpose, refused to set aside, and thereupon the plaintiffs sue out this writ of error.

The plaintiffs in error, to shew title in themselves, offered in evidence the record of a judgment rendered against Thomas Talbot at the suit of J. Vanbibber, in the Warren circuit court, on the 25th June, 1835, on which an execution issued on the 28th day of March, 1837, by virtue of which the tract of land in dispute was sold to John Jones, the ancestor of the plaintiffs, who received a deed therefor, bearing date July 24, 1837. Thomas Talbot, the tenant in possession, formerly owned the land, and at the commencement of the suit was in the occupation of it as tenant to Mary Fox, formerly Mary Pitzer, who was made co-defendant.

The defendants in error, on their part, offered in evidence a deed of trust, executed by Thomas Talbot, to Wm. J. Talbot, on the 3d day of April, 1832, conveying to said Wm. J. Talbot, together with other property, the tract of land in dispute, for the payment of the debts in the deed mentioned. This deed was filed for record in Montgomery county on the 4th of April, 1832. There was also offered in evidence, the record of a suit in chancery, instituted by David Hickman, on the 14th day of November, 1832, against Thomas Talbot and others, the object of which was to set aside the deed of trust above mentioned, as being made in fraud of creditors, and to obtain satisfaction of a judgment recovered by said Hickman on the 8th day of May, 1832, in the Montgomery circuit court, against Thomas Talbot, for the sum of \$934 46 debt,

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besides costs, on which execution was issued, which proved unavailing, in which suit a decree was rendered on the 11th day of June, 1835, for the sale of the trust property, under which it was accordingly sold and Mary Fox became the purchaser of the tract of land now in controversy, for which she received a deed dated 14th Oct. 1835. Thomas Talbot held as tenant under Mary Fox. The plaintiffs in error objected to the introduction of the testimony offered by defendants, but the objection was overruled, to which an exception was taken. The plaintiffs then offered as rebutting testimony, to show that the deed of trust was fraudulent and void, as being made to hinder and delay creditors, amongst whom was J. Vanbibber, under whose judgment the ancestor of the plaintiffs became purchaser of the land in dispute. The court refused to let this evidence go to the jury, to which the plaintiffs excepted.

The propriety of admitting the testimony offered by the defendants, and of excluding that proposed to be given by the plaintiffs, are the questions presented for our determination. The objections of the plaintiffs in error to the admissibility of the decree in the suit of Hickman against Talbot, were, that it was *res inter alios acta*; they were not parties nor privies to the decree, and that therefore they were not bound by it; that a power of sale already existed in the trustee, by virtue of the deed of trust, and that the decree conferred no additional power or authority on him. No principle of law is better settled, than, that a judgment or decree is binding only on parties and privies, and that the rights of persons not parties nor privies to a judgment, cannot be affected by it. But for establishing the fact that a judgment has been pronounced, and all the legal consequences of such a judgment, the judgment itself is invariably not only admissible as the proper legal evidence, but is usually conclusive evidence to prove that fact, for it must be presumed that the court has made a faithful record of its proceedings. The fact that such judgment was given, can never be considered as *res inter alios acta*, being a thing done by public authority, nor can the legal consequences of such a judgment be ever so considered. This may be exemplified from the proceedings on an indictment for perjury in the trial of a cause; it is necessary to show that there was such a trial, and the record of it, although the defendant was not a party thereto, is conclusive evidence of the fact; so in an action for a malicious prosecution, the fact of the acquittal of the plaintiff, can only be shown by the record of the trial, and is conclusive on the defendant, although he was no party to the proceeding. So the fact of the existence of a judgment is shown by the production of the record

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of it, and no person can object that as to him it is *res alios acta*. Greenleaf's Evidence 54.

But it is objected that the court refused to receive evidence showing that the deed of trust was fraudulent, and void between all parties to it. That the deed was fraudulent and void, may for argument's sake, be admitted. Hickman, who filed the bill to set aside the deed, and obtain a decree for a sale, in order to have satisfaction of his judgment at law, was not a party to the fraud, nor is any such pretence set up. But even if he were a party to the fraud, how can that circumstance affect the title of the purchaser under the decree, who had no notice of any fraud. It is well settled that the title of a purchaser under an erroneous judgment, will not be affected by its reversal. If the court has jurisdiction of the person, and of the subject matter of the controversy, although its proceedings may be erroneous, or irregular, a purchaser under its judgment or decree, will be protected in the enjoyment of the title which he has acquired by such means. The regularity of the proceedings cannot be questioned in a collateral action. The distinction is between void and voidable acts. Where there is no authority in the court to act when its proceedings are *coram non jndice*, then they are null and void; they afford no protection to others, and can confer no rights: but when the court has jurisdiction, however erroneous or irregular its proceedings may be, they are regarded as valid and binding, until they have been reversed or annulled, by suitable proceedings instituted for that purpose; and titles acquired by sales under them will be protected. McNair et al vs. Biddle, et al, 8 Mo. Rep. 266. Vorhees vs. Bank U. States, 10 Peters, 473. Thompson vs. Tomlin, 2 Peters, 163. Jackson vs. Bartlett, 8 John. Rep. If it be said that the complaint is not against the error or irregularity of the proceedings, but that the deed of trust which gave rise to the suit under which the sale made was fraudulent and void, how can that circumstance affect the principle? The fact that the deed was void, shows that Hickman clearly had a right to go into equity, in order to have it set aside and obtain satisfaction of his debt; he was no privy to the fraud; the proceedings on his part were bona fide, and a sale made under a decree rendered in his suit, would beyond all doubt confer an indisputable title on the purchaser under it. We may put a stronger case, and suppose the claim of Hickman was fraudulent, and the parties to the deed connived at the fraud, would not a sale under a decree obtained in such a proceeding give a valid title to the purchaser who was not affected with notice of the fraud? Does not the principle which protects the purchaser against any error or irregularity in the

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proceedings, equally preclude an inquiry into the consideration of the judgment, or of the merits and justice of the claim on which it is founded. That a court was made the instrument of consummating a fraud between two parties, cannot affect an innocent purchaser under its decree. *French vs. Shotwell*, 5 John R. 555.

We cannot see the force of the objection, that the sale under which the defendant claims, might have been made by the trustee without any decree of a court. Had such been the fact, the condition of the defendant might have been changed; but as it appears that the sale was made under the decree, we do not conceive how that consideration can affect this case. It clearly appears that the sale was made in pursuance of the decree, and the recital of the fact in the notice, that it was by virtue of the deed of trust, cannot detract from the force of the recital, that it was in pursuance of the decree.

Judgment affirmed.

GARRETT, ET AL, vs. FERGUSON ADMRS.

1. Parol evidence is admissible to prove who is principal, and who surety, to a bond or note, in a suit at law.
2. In a suit against several, one is not competent to prove that he is principal, and the others sureties, so as to release the sureties. He is interested; his liability in the event of a recovery against, and payment by the sureties, being greater than it would be to the payee of the bond or note.

APPEAL from St. Louis Court of Common Pleas.

GAMBLE AND BATES, for Appellants.

The Appellants make the following points:

- 1st. That where a bond or note is made by several persons, one of whom is principal and the others securities, and the obligee or payee, makes an agreement with the principal for a consideration, to extend the time of payment without the consent of the securities, this discharges the securities. It cannot be necessary to cite authorities on this point.
- 2d. That where the form of the note does not show the relation of

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the parties as principals and securities, it is competent for the securities to show it by parol evidence. *Well vs. Girling*, 4 Eng. Com. L. Reports 264; *Paine vs. Pachard*, 13 John. R. 175; *King vs. Baldwin*, 2 John. Ch. R. 555; *King vs. Baldwin*, 17 John. R. 399; 4 New Hampshire Reports 221.

3d. That Potterfield was in this case a competent witness for the other defendants upon the defence set up. It is manifest that he was not interested in the result of the trial, and being disinterested he was a competent witness, although a party on the record. *Worral vs. Jones and others*, 20 Eng. Com. Law R. 177; 6 Monroe 617; 6 Bing. 306.

There is probably no question in the law which has more frequently been discussed and decided in courts, than the competency of parties to the record as witnesses. In many of the cases the exclusion of the witness is put upon the ground of policy, in others of interest; in some, the two grounds are combined. The more recent decisions refer the question entirely to the interest of the witness; and where he is disinterested, he is admitted.

4th. Upon the case as acted upon by the court, there should have been a new trial granted.

GEYER & DAYTON, for Appellees.

The questions arising in the case are:

1st. Was Potterfield a competent witness?

2d. Was the evidence offered to be given by him competent?

In relation to the first question, the counsel for the appellees contend that Potterfield was incompetent.

First, Because he was a party to the record.

Second, Because he was directly interested in the event of the issues to be tried.

NAPTON, J. delivered the opinion of the court.

This was an action of assumpsit brought by the appellees upon a promissory note executed by the appellants, and one Daniel Potterfield, to the intestate, Th. J. Ferguson.

The note was as follows:

"\$1000. Twelve months after date for value received, we or either of us, promise to pay Th. J. Ferguson, or order, one thousand dollars,

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bearing ten per cent. interest per annum. Given under our hands this 1st day of July, 1840.

DANIEL POTTERFIELD,
TH B. CLAGGETT,
ENOS GARRETT,
ENOS GARRETT, JR."

After a judgment by default against Potterfield, the appellants appeared and pleaded, *first*, non assumpsit; *second*, that they executed the note as security, with the knowledge of Ferguson, and that after the making of the note, Ferguson in consideration that Potterfield executed his note to him for eighty dollars, did agree with Potterfield, to give him twelve months further time for the payment of the said note sued on, without the consent of the defendants; and *third*, that usury had been received on said note.

Upon the trial of the issues, the defendants produced Potterfield as a witness, who stated that he was principal, and the appellants were securities in the note sued; whereupon objections were made to the competency of the testimony and to the competency of the witness. The witness then produced a release from Claggett and from the Garretts, discharging said Potterfield from all liability to them for costs. He also acknowledged his indebtedness to the appellees, to the amount of the note sued on, and interest thereon; and desired the court to enter up judgment against him for said amount. The court sustained the objections to the competency of the testimony, and to the competency of the witness, and refused to enter up judgment against said Potterfield, on his confession in open court; and thereupon no other testimony being offered or given in the issue, a verdict was rendered against the defendants, and the court assessed the damages against Potterfield; and one judgment was thereupon accordingly rendered against them all.

Two questions are presented by the record; *First*, Was parol evidence competent to show that Potterfield was principal, and Claggett and others securities in the note sued on? and *Second*, If so, was Potterfield a competent witness to establish this? *First*, It has been questioned, whether in an action on a bond, in which the obligors are bound jointly and severally, it could be shown in a court of law, who were principals, and who were securities; the relation of the parties not appearing upon the face of the instrument. In the case of Sprigg vs. Bank of Mount Pleasant, (10 Peters 266,) Mr. Justice Thompson declared the rule to be well settled, that where principal and security are bound jointly and severally in a bond, although there is no express admission on the face of the instrument that all are principals, yet the

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surety cannot aver by pleading that he is surety only. In *Rees v. Bennington*, (2 Ves. Jr. 542,) Lord Loughborough said: that in such cases, the form of the security forced them into equity: that at law, the security could not aver by pleading, that he was bound as security; but that if he could establish that at law, the rule by which his liability was to be determined, was a legal one. It will be remarked, however, that in the first mentioned case, the opinion of the judge was merely thrown out *arguendo*, and the point did not arise in the cause, it appearing upon the face of the instrument there sued on, that the obligors all executed them as principals. In the case of *Rees v. Bennington*, there was an application for an injunction to stay proceedings upon a judgment at law, against the surety, because the obligee had taken notes from the principal, without the knowledge of the surety, and given the principal further time. Judge Spencer (in *King vs. Baldwin*, 17 J. R. 399,) alluding to this opinion of Lord Loughborough, expresses his dissent in the following language: "We would not assent to his Lordship's proposition, that the fact of a man's being bound as security, could not be enquired into at law, if it became material to a legal enquiry, for we understand the rules of evidence to be the same in both courts; and we in vain sought for the principle, which allowed the enquiry in a court of equity, and denied it to a court of law; and we therefore came to the conclusion, that the defence being a legal one, it necessarily followed from the general rules of evidence, being alike in both courts, that a court of law was competent to administer relief, and to examine all the facts necessary to relief."

In *Craythorne vs. Swinburn*, (14 Ves. Jr. 171,) Lord Eldon speaking of an obligation in which the obligors were bound jointly and severally, said that evidence was admissible to show who was the principal and who the security, and in order to determine that, to show to whom money was advanced.

The case of *Pain v. Packard*, (13 John. R. 175,) was upon a note, and it does not appear from the report of that case, whether the relation of the parties appeared on the face of the instrument, or not. The plea setting up a defence, arising out of the relation of principal and surety, was sustained by the court; and in the subsequent case of *King v. Baldwin*, in the court of errors, the case of *Pain and Packard*, was much criticised, and though there was much diversity of opinion expressed in relation to the main point in that case, relating to the degree of indulgence which the creditor might give to the debtor, without discharging the security, no objection was taken to the admission of the plea, on the ground that it would let in parol testimony to explain re-

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lations of the parties to the note. It was intimated by one or two senators, that had the instrument been a bond, a court of chancery alone could have afforded relief.

In *Wells v. Girling*, (8 Taun. 737) the plaintiff in *indebitatus assumpsit*, offered in evidence a note, of which the defendant was one of the makers, and the defendant was permitted to show that he only was surety.

In *Bank vs. Kent*, (4 N. H. R. 224) the court adopted the rule, that where the maker, who has signed as surety, does not appear on the face of the paper to be surety, he is to be considered and treated as a principal, with respect to all those who have no notice of his real character; but that wherever it is material, a defendant may show by intrinsic evidence, that he made the note as a surety only, and that it was known to the plaintiff that he was only a surety. From these cases it will appear that the legality of admitting parol testimony, to show the actual relation of the parties to a note or bond, where that relation was not apparent from the face of the instrument, has been doubted, and that a distinction has been taken between notes and bonds, the propriety of which has also been questioned. It is unnecessary and would be unprofitable, to pursue the inquiry here. Whatever doubts may have been entertained on this subject, it is not difficult to establish, from the legislation of this State in relation to securities, from the well known usages of the country, and from the previous decisions of this court, that the law here is considered well settled in favor of the admissibility of such evidence. In the case of *Foster & Foster vs. Wallace*, (2 Mo. R. 231) the point was expressly decided, and that in the case of a bond. Our act concerning securities, which enables them to hasten the collection of the debt for which they have become responsible, and relieves them from liability in certain specified cases, would be almost unavailing and inefficient, if it were understood by the law that unless it appeared on the face of the instrument, who was security, and who principal, that fact could not be shown from extrinsic evidence. Most of the bonds and notes, current in our State, are of the character of the one sued on; they are joint and several, and it rarely happens that upon their face it appears who are principals, and who are sureties. If this fact could not be shown, securities would be virtually deprived of the benefits and privileges secured to them by the Legislature.

Second, Was Potterfield a competent witness? The general rule of law is, that parties to the record are not competent witnesses, and this rule is founded on the presumption, that they are persons who have an immediate interest in cause. But as in the progress of a cause, the

situation of some of the defendants may be essentially changed by default, or *nolle prosequi*, or verdict, it is generally held in actions of tort, that where a suit is ended as to one of several defendants, and he has no direct interest in its event as to the others, he is a competent witness for them, his own fate being at all events certain. Greenleaf's Ev. p. 400. This rule, however, has not in England, or in those States where the common law has undergone no material change in this particular, been extended to action on contract.

In *Brown vs. Brown*, (4 Taun. 751) the action was upon a joint contract against two, one of whom had suffered judgment by default. The party against whom the judgment by default had gone, was held to be incompetent to testify against his co-defendant, because if the plaintiff succeeded, the witness would prove another equally liable with himself, and therefore obtain contribution. This principle was recognized by this court in the case of *Levy vs. Hawley*, 8 Mo. R. 511.

In *Mant vs. Mainwaring*, (8 Taun. 139) the action was on a joint contract against several partners; and one defendant, who had suffered judgment by default, was called on to prove the partnership. He was held to be incompetent. The judges did not agree, however, upon the grounds for ruling him incompetent. Dallas, J., placed it on the ground that the witness was a party, and his co-defendants did not consent.—Park, J., said he was interested; that his judgment by default would only be operative in case of a verdict against the others; and therefore, he could not be called for them; and if called by the plaintiff, he might still give evidence for his co-defendants. Burrough, J., held that all the parties to a record must consent, before any one of them could be examined as a witness. The same point was ruled by this court in the case of *Dixon vs. Hood*, 7 Mo. R. 414; but the exclusion of the witness was placed on the ground, that he was interested in establishing the fact that others were jointly liable with himself.

In *Worrell vs. Jones*, 7 Burgh. 395, the action was on a bond for the payment of rent, &c. The principal, Jones, suffered judgment by default, and the plaintiff called him as a witness against his co-defendant. The chief justice, (Tindall,) said that Jones had no interest, as he could not call for contribution, and admitted himself to be the principal debtor; and as he did not object to being examined, and the only objection was, that he was a party on the record, this objection he considered futile, and said that no case could be found where this objection alone prevailed.

The relation of the parties to each other, in the case now before the court, is precisely the same, as in the case last cited; and according to

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that authority, Potterfield would have been a competent witness against his co-defendants. The reasons given by Mr. Justice Park, in *Brown vs. Brown*, for excluding the testimony of a witness, in the situation of Potterfield, in behalf of his co-defendants, has no application in this State, where a plaintiff may sue as many joint obligators as he pleases, and may recover against one or more of them. So far as the costs were concerned, the release removed that objection. Still the situation of the witness is not the same, if the recovery is against the securities, as it would be if the recovery was against the witness alone. For if the recovery be had against the witness alone, he will have to pay the judgment and interest, at the rate of six or ten per cent., as the form of the note may require; but if the recovery be against the securities, they may have to pay that amount, and will be entitled under our statute, to recover not only that amount from the principal, but ten per cent. interest upon the amount they may be compelled to pay. So that the witness is interested in defeating the plaintiff's action, against the securities, not only so far as costs are concerned, which in that event he will be liable for, but because he will be further liable for interest upon the gross sum, they may be compelled to pay. *Shelton vs. Ford and Whitehill*, 7 Mo. R. 210.

Inasmuch as the court of common pleas rejected any evidence to explain the situation of the parties to the note, the judgment of that court is reversed, and the cause remanded.

WISE vs. DARBY, ADMINISTRATOR, &c.

1. A writ of error will lie, on the decision of a motion, to require a sheriff to pay over money in satisfaction of an execution.
2. The lien of an execution in the hands of a sheriff, the levy of which is directed to be stayed by the plaintiff, is destroyed as to executions subsequently coming to the hands of the sheriff, and the latter will be first satisfied.
3. So, where there has been a levy and the proceedings are then stayed by plaintiff.

ERROR to St. Louis Court of Common Pleas.

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CALLAHAN, for Plaintiff in Error.

LEONARD & BAY, for Defendant in Error.

POINTS AND AUTHORITIES.

1. The executions of the plaintiffs in error, by the directions given to the sheriff to delay the levy for an indefinite period, became dormant, and constructively fraudulent: the plaintiffs, therefore, lost their preference. Kellogg vs. Griffin, 17 J. R. 275; Benjamin vs. Smith, 4 Wend. 333; Storm & Buckman vs. Woods, 4 J. R. 109; Kempland vs. Macaulay, Peake 66; Pringle vs. Price, 11 Price, 415.

2. The last executions of the plaintiffs in error were improvidently issued. The executions first issued were returnable to the September term of the court, under the 5th sect. of the act of Feb. 6, 1843; Session Acts of 1842-3, p. 55; also, 28 sect. of act establishing the court of common pleas of St. Louis county; Session acts of 1841-2, p. 53.

3. A writ of error will not lie in this proceeding, which is not a "*final judgment or decision*, in the cause," within the meaning of the first section of the act of 1835, concerning "practice in the supreme court," but is an interlocutory or collateral order. Buel vs. Street, 9 J. R. 443; 14 J. R. 76; Brooks vs. Hunt, 17 J. R. 484; in the matter of Negus, 10 Wend. 34.

NAPTON, J., delivered the opinion of the court.

This was a motion made by Darby, the defendant in error, in the court of common pleas of St. Louis county, asking that court to instruct the sheriff to sell certain property levied on by virtue of an execution in favor of said Darby against M. & F. Steigers, and to apply the proceeds to the satisfaction of that execution.

The motion was resisted by the plaintiffs in error, who claimed the property, by virtue of executions in their favor, issued anterior to the executions in favor of the plaintiff in error, and first placed in the hands of the sheriff. Affidavits in support of the motion, and counter affidavits in behalf of plaintiffs in error, were read on the hearing of the motion. The court sustained the motion, and directed the proceeds of the sale to be paid over to the defendant in error.

It appears from the affidavits, and from the returns made upon each of the executions, that the execution in favor of Darby, adm'r of Gross, against M. & F. Steigers, issued on the 24th March, 1843, for the sum

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vs. Barber, 3 Cow. 279; Edwards vs. Harben, 2 Term R. 596, 7 Mod. 37; Russell vs. Gibbs, 5 Cow. 394.

This doctrine results from the principle, that the levy divests the property from the defendant, and that to leave such property in the possession of the defendant, by the connivance, or at the request of the plaintiff in the execution, would be fraud against subsequent executions. Would not the objections be as great to the conduct of a plaintiff, who when he delivers his writ, accompanies that delivery with a declaration that he does not desire it to be executed? The lien of an execution, is merely the right to have the property of the defendant subjected to the payment of that execution. This lien attaches by the delivery of the writ. But a lien which cannot be enforced, would seem to be a contradiction in terms; and if, as we have seen in the case of *Smallcomb vs. Buckingham*, the judge was influenced in his determination by the fact that the plaintiffs in the first writ had told the sheriff he was in no haste, (1 Salk. 320,) much stronger would be the inference against the vitality of a lien, when the party interested actively interferes, and directs the officer not to levy. Is it not obvious that to uphold such a lien, would be to open a door to fraud, and enable plaintiffs by collusion to protect the goods of their debtors from other executions?

If the property of the debtor is held by the first execution, notwithstanding the officer is directed not to levy it, and that execution is sufficient to cover all the property, the other creditors cannot sue out executions, so as to be available, and the property of the debtor is thus protected. Thus all the evils would arise, to suppress which, the courts established the rule, that the creditor should not interfere after a levy, and still retain his priority.

Judgment affirmed.

DRYDEN vs. HOLMES.

1. A deed conveying a lot of ground, and describing it as "with a brick tenement thereon," does not contain a covenant that such a tenement was on said lot. The words are merely descriptive. See *Ferguson vs. Dent*, 8 vol. Mo. Rep.

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DAWSON, for Plaintiff in error.

POINTS AND AUTHORITIES.

If land be conveyed as bounded by "a way" upon one side, this is not merely a description, but a covenant that there is such a way. *Parker et al vs. Smith*, 17 Mass. Rep. 413.

I would refer the court to the decision of the supreme court of Missouri, in the case *Burnsides' Executors vs. Russell*, that very point was settled, as in the case of 17 Mass. Rep.

No particular no words are necessary to constitute a covenant; *any* words under seal showing an agreement or undertaking is a covenant, and it shall be judged of, by the whole tenor of the deed. 2 Selw. N. P. 391; 3 Com. Digest 236, Covenant A 1; 1 Bibb 379.

POLK, for the defendant in error.

To sustain the judgment of the court below, the defendant in error, relies upon the following point: That the deed upon which this action is founded, contains no covenant that there is, or was at the time of the execution of said deed, a brick tenement on the lot therein conveyed.

NAPTON, J., delivered the opinion of the court.

This was an action of covenant, brought upon a deed of bargain and sale, from Holmes to Dryden, purporting to convey a certain lot in the city of St. Louis. The deed described the lot as "the west part of lot No. 6, in Gay and Taylor's addition to St. Louis—commencing at the west part of lot No. 6, thence east twenty feet, thence north seventy-one feet, thence west twenty feet, thence south twenty-one feet, with a brick tenement thereon." One of the breaches assigned is, that the said defendant covenanted that a brick tenement was situated on said lot of ground, but the said defendant had broken his covenant, that said brick tenement was not on said lot.

The declaration was demurred to, and the demurrer sustained by the court. The only question is, whether the terms of the deed, in which the lot is represented to have a brick tenement thereon, can be construed as a covenant, or are merely words of description.

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that authority, Potterfield would have been a competent witness against his co-defendants. The reasons given by Mr. Justice Park, in *Brown vs. Brown*, for excluding the testimony of a witness, in the situation of Potterfield, in behalf of his co-defendants, has no application in this State, where a plaintiff may sue as many joint obligators as he pleases, and may recover against one or more of them. So far as the costs were concerned, the release removed that objection. Still the situation of the witness is not the same, if the recovery is against the securities, as it would be if the recovery was against the witness alone. For if the recovery be had against the witness alone, he will have to pay the judgment and interest, at the rate of six or ten per cent., as the form of the note may require; but if the recovery be against the securities, they may have to pay that amount, and will be entitled under our statute, to recover not only that amount from the principal, but ten per cent. interest upon the amount they may be compelled to pay. So that the witness is interested in defeating the plaintiff's action, against the securities, not only so far as costs are concerned, which in that event he will be liable for, but because he will be further liable for interest upon the gross sum, they may be compelled to pay. *Shelton vs. Ford and Whitehill*, 7 Mo. R. 210.

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WISE vs. DARBY, ADMINISTRATOR, &c.

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ERROR to St. Louis Court of Common Pleas.

Wise vs. Barry, Administrator, &c.

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POINTS AND AUTHORITIES.

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The motion was resisted by the plaintiffs in error, who claimed the property, by virtue of executions in their favor, issued anterior to the executions in favor of the plaintiff in error, and first placed in the hands of the sheriff. Affidavits in support of the motion, and counter affidavits in behalf of plaintiffs in error, were read on the hearing of the motion. The court sustained the motion, and directed the proceeds of the sale to be paid over to the defendant in error.

It appears from the affidavits, and from the returns made upon each of the executions, that the execution in favor of Darby, adm'r of Gross, against M. & F. Steigers, issued on the 24th March, 1843, for the sum

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of about eight hundred dollars, and was placed in the hands of the sheriff on the same day. At that time, the sheriff had in his hands two executions against the same parties, one in favor of S. Wise, and the other in favor of P. Wise, amounting to about seven hundred dollars; but annexed to each of the last mentioned executions, were written instructions by the plaintiff's attorney directing the sheriff not to levy, until ordered by said attorney. The defendant in error directed the sheriff to levy his execution forthwith, and the sheriff did so. On the evening of the same day, and before the inventory of the property levied on under the execution of Darby was completed, the attorney of the plaintiff in error went to the Sheriff, and tore off the written instructions appended to the executions, and directed an immediate levy on the same property. The Sheriff levied, made sale and returned the facts especially, bringing the money into court, to be paid over as the court should direct.

Before examining the main question, it is necessary to dispose of the objection taken by counsel for the defendants in error, "that this is not a final judgment or decision within the meaning of our act regulating the practice and proceedings of this court, and that a writ of error will not lie."

As the Sheriff had not paid over the money collected, there could be no objection to settling the rights of the execution creditors by motion. *Hutchinson vs. Johnson*, 1 T. R. 732. That the decisions of the court of common pleas on that motion was final; that it was the end of the case is apparent. Unless there be something in the character of a judgment upon a motion, which would make a *mandamus* the proper writ to test the propriety of that judgment, the objection to the writ of error cannot prevail.

The writ of *mandamus* only lies in cases where the inferior court has done, or refuses to do, a mere ministerial act. It would seem sufficiently manifest from the statement of the facts in this case, that the decision, or judgment upon the motion, involved the determination of a question of law, and the application of that law to the facts in proof. We see no objection, therefore, to the writ of error.

The main question for determination is: where an execution is delivered to a sheriff, and the plaintiff or his attorney directs the officer not to levy, and a second execution is placed in the hands of the same officer, which is first levied, and the goods sold under both writs, which shall be first satisfied?

Though the writ of execution binds the goods from the time it is delivered into the hands of the officer, the property of the defendant in

Wise vs. Darby, Administrator, &c.

the execution is not divested until he levy. As a consequence of this principle it has been held, that where two executions are delivered to the sheriff, and he levies and sells under the one last delivered to him, such sale passeth a good title to the purchaser, and the only remedy of the plaintiff in the first execution is against the officer. *Smallcomb vs. Buckingham*, 1 Salk. 321. And Lord Holt intimated in this case, that if the person who sued out the first writ concealed it in his hand, the sheriff may rightly make execution on another writ, which bears the last test, but came first to his hands. In such case the sheriff would not be responsible. This was before the Statute providing that writs should bind only from the time of their delivery. But where two writs of *fieri facias* were delivered to the sheriff on different days, and the levy was made under the second execution, but no sale actually made, the sheriff was held justified in paying over the proceeds to satisfy the first execution. *Hutchinson vs. Johnson*, 1 Term R. 731.

In the case of *Payne vs. Drew*, 4 East 523, a writ of sequestration issued from the court of chancery in June, 1800; eighteen months afterwards, and before the sequestrators had executed the writ, a writ of execution from the court of common pleas came to the sheriff's hands, and it was held that the sheriff was not justified in returning *nulla bona* to the execution. Lord Ellenborough said, that where there were several authorities equally competent to bind the goods of a party when executed by the proper officer, they shall be considered as effectually, and for all purposes bound by that authority, which first actually attaches upon them in point of execution, and under which an execution shall have been first executed.

In the case now before the court, the execution in favor of the plaintiffs in error, first came to hand, and the execution of the defendant in error was first levied; and according to the case of *Hutchinson vs. Johnson*, if the written instructions are thrown out of consideration the sheriff, notwithstanding his having levied first under the execution of defendant in error, should pay the proceeds to the plaintiffs in the first executions. The question then arises, did the lien of the first execution commence from the time of their delivery, or was that lien destroyed, or suspended by the acts of the plaintiffs in error?

In England, as well as in this country, the doctrine is firmly established, that where the creditor gives instructions to the officer, *after a levy*, to delay, or not to proceed on the execution, such execution is held to be fraudulent, and void as against a subsequent execution. *Whipple vs. Foot*, 2 J. R. 416; *Storm vs. Woods*, 11 J. R. 110; *Rew*

Dryden vs. Holmes.

vs. Barber, 3 Cow. 279; Edwards vs. Harben, 2 Term R. 596, 7 Mod. 37; Russell vs. Gibbs, 5 Cow. 394.

This doctrine results from the principle, that the levy divests the property from the defendant, and that to leave such property in the possession of the defendant, by the connivance, or at the request of the plaintiff in the execution, would be fraud against subsequent executions. Would not the objections be as great to the conduct of a plaintiff, who when he delivers his writ, accompanies that delivery with a declaration that he does not desire it to be executed? The lien of an execution, is merely the right to have the property of the defendant subjected to the payment of that execution. This lien attaches by the delivery of the writ. But a lien which cannot be enforced, would seem to be a contradiction in terms; and if, as we have seen in the case of Smallcomb vs. Buckingham, the judge was influenced in his determination by the fact that the plaintiffs in the first writ had told the sheriff he was in no haste, (1 Salk. 320,) much stronger would be the inference against the vitality of a lien, when the party interested actively interferes, and directs the officer not to levy. Is it not obvious that to uphold such a lien, would be to open a door to fraud, and enable plaintiffs by collusion to protect the goods of their debtors from other executions?

If the property of the debtor is held by the first execution, notwithstanding the officer is directed not to levy it, and that execution is sufficient to cover all the property, the other creditors cannot sue out executions, so as to be available, and the property of the debtor is thus protected. Thus all the evils would arise, to suppress which, the courts established the rule, that the creditor should not interfere after a levy, and still retain his priority.

Judgment affirmed.

DRYDEN vs. HOLMES.

1. A deed conveying a lot of ground, and describing it as "with a brick tenement thereon," does not contain a covenant that such a tenement was on said lot. The words are merely descriptive. See Ferguson vs. Dent, 8 vol. Mo. Rep.

Dryden vs. Holmes.

ERROR to St. Louis Circuit Court.

DAWSON, for Plaintiff in error.

POINTS AND AUTHORITIES.

If land be conveyed as bounded by "a way" upon one side, this is not merely a description, but a covenant that there is such a way. Parker et al vs. Smith, 17 Mass. Rep. 413.

I would refer the court to the decision of the supreme court of Missouri, in the case Burnside's Executors vs. Russell, that very point was settled, as in the case of 17 Mass. Rep.

No particular words are necessary to constitute a covenant; *any* words under seal showing an agreement or undertaking is a covenant, and it shall be judged of, by the whole tenor of the deed. 2 Selw. N. P. 391; 3 Com. Digest 236, Covenant A 1; 1 Bibb 379.

POLK, for the defendant in error.

To sustain the judgment of the court below, the defendant in error, relies upon the following point: That the deed upon which this action is founded, contains no covenant that there is, or was at the time of the execution of said deed, a brick tenement on the lot therein conveyed.

NAPTON, J., delivered the opinion of the court.

This was an action of covenant, brought upon a deed of bargain and sale, from Holmes to Dryden, purporting to convey a certain lot in the city of St. Louis. The deed described the lot as "the west part of lot No. 6, in Gay and Taylor's addition to St. Louis—commencing at the west part of lot No. 6, thence east twenty feet, thence north seventy-one feet, thence west twenty feet, thence south twenty-one feet, with a brick tenement thereon." One of the breaches assigned is, that the said defendant covenanted that a brick tenement was situated on said lot of ground, but the said defendant had broken his covenant, that said brick tenement was not on said lot.

The declaration was demurred to, and the demurrer sustained by the court. The only question is, whether the terms of the deed, in which the lot is represented to have a brick tenement thereon, can be construed as a covenant, or are merely words of description.

Fisk vs. Collins.

This question was examined at the last term of this court, and decided in the case of Ferguson vs. Dent. Agreeably to that opinion, the judgment of the circuit court must be affirmed.

FISK vs. COLLINS.

1. In an action of assumpsit upon a bill of exchange by indorsee against maker, evidence to shew that the bill was obtained fraudulently, or without consideration, and that indorsee was privy thereto, is admissible.

ERROR to St. Louis Circuit Court.

Polk, for Plaintiff in Error.

For reversal of the judgment of the court below, the plaintiff in error makes the following points:

1. The court below committed error in admitting the instrument of writing offered by the defendant in error.

That this instrument was irrelevant to the issues, considered by itself, there can be no question. Nor is it made relevant by the testimony of the witness Anderson. That testimony, it would seem, was offered to show (which however it did not do,) that the consideration of the bill on which this action was brought, was that plaintiff in error would give up to Collins, Leslie's draft on him for \$1,000, which he could not do, as the draft belonged to the witness, Anderson; and that therefore the bill was without consideration. But admitting for the sake of argument, that Anderson's testimony proved all it was offered to prove, it is still apparent that the consideration of the bill was the *agreement* of plaintiff in error to deliver to Charles Collins, Leslie's draft on him, and not the fact of such delivering. Now this consideration was in full force at the commencement of this action, and still so remains in full force, for the agreement of plaintiff in error still retains its full obligation upon him, whether he will be ever able to fulfil it or not. But the very testimony of Anderson shows that plaintiff was able to fulfil his agreement. For it shows him in possession of the bill of Leslie on Collins, and able to hand it over to Collins. And though he might have

Fisk vs. Collins

broken his faith with witness, to have handed it over to Collins, yet he might have handed it over, and thus met the obligation of his contract. Indeed, the fair impression from the testimony of the witness is, that the bill was handed over by plaintiff in error according to his agreement.

2. The court below erred in admitting the testimony of Anderson; this testimony, considered by itself, and separate from every thing else, is clearly irrelevant. Nor does it become relevant, for the reasons already advanced, when considered in connection with the instrument of writing above referred to.

3. The court below erred in overruling the motion of plaintiff in error for a new trial.

First, Because the court received improper evidence, to wit: the above mentioned instrument of writing, and the testimony of Anderson.

Second, Because there was not sufficient evidence to warrant the finding of the court for defendant in error. The defendant's own proof, (see the instrument of writing given in evidence by defendant,) shows that plaintiff had agreed to deliver up to Collins, the draft of Leslie, because Collins had paid him the amount; not because Collins had given him the draft, upon which this suit is brought. And when the testimony of Anderson is adduced to help the matter out, it refers to an admission of the plaintiff, (the weakest species of evidence,) to the effect that Collins had made some arrangement for the satisfaction of the draft, by giving some paper, without specifying whose, or what kind of paper. And witness "understood something to be said about a bill or note of Tabor," uncertain as to whether note or bill, and only something said about it; not that the note or bill was given as the consideration of the agreement to take up Leslie's draft as aforesaid. But the rebutting testimony of St. John, shows that the transaction in which the bill sued on in this case was given, was an entirely different one from that referred to in the instrument of writing given in evidence by defendant in error; and that the bill was given to take up notes executed by defendant to plaintiff, and then due and unpaid, and left with witness for collection.

GAMBLE, for Defendant in Error.

The only questions presented for decision, are :

1. Whether the court erred in admitting the evidence offered by defendant.

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2. Whether the court erred in overruling the motion for a new trial.

On the first point it is obvious, that the defence sought to be established, was that the bill sued on, was obtained without consideration, and by fraud. The plaintiff, after the bill sued on was made, acknowledges that he had been paid the amount of a bill of Leslie, previously made, and drawn upon Collins, and makes an acknowledgment, which goes to show that the bill sued on was given in payment of that previously made; and the evidence then shows that the plaintiff was not the owner of Leslie's bill and not entitled to receive payment of it, and that even at the time of trial, it still belonged to the witness Anderson. Now I hold that it was both competent and relevant testimony, which tended to prove that the plaintiffs had procured this bill by representing himself as the owner of the bill drawn by Leslie on Collins, when he was not such owner. This proof would shew that the bill was not only without consideration, but that it was obtained by fraud.

The *effect* of the evidence was not involved in the question of its admissibility, that is, it was not for the court to determine whether the evidence offered would prove the fact sought to be established—that was the province of the jury, or in this case, of the court sitting as a jury: but if it tended in any degree to prove any fact which might be available to the defendant, it was relevant, and ought therefore to have been admitted.

On the question whether the court should have granted a new trial, it is to be observed, that there was no instruction asked, no decision of any question of law by the court, and for this court to review the decision, is substantially to review the verdict upon the evidence, and not the decision of the court in any question of law.

It is understood that this court has at this term, in similar cases, decided that a judgment rendered on a verdict found by the court, as a jury, and without any express decision of any question of law by the court, would not be reversed on error.

TOMPKINS, J., delivered the opinion of the court.

Francis M. Fisk brought his action of assumpsit against Charles Collins, in the circuit court of St. Louis county; and judgment in that court being entered up against him, he brings the cause into this court by writ of error to reverse it.

The action is brought on a bill of exchange, dated the seventh day of November, 1838, drawn by the defendant Collins, on one Joseph Tabor,

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requesting him to pay, six months after the date thereof, to the order of Munn & Lindsley, one thousand dollars for value received. This bill was the same day accepted by Tabor, and after acceptance, indorsed by the payees, Munn & Lindsley, to Fisk, the plaintiff in this action.

The defendant pleaded the general issue, and a set-off. The cause was submitted to the circuit court without the intervention of a jury. The circuit court gave judgment for the defendant, on the issues made on each of the pleas above mentioned. The defendant in the circuit court, appellee here, gave in evidence on the trial of the cause, the following instrument of writing, having first proved its execution by the appellant, plaintiff in the circuit court, to-wit: "I have this day sold, and transferred to Charles Collins, for value received, a draft which was drawn by Miron Leslie on said Collins for one thousand dollars, and by him not accepted; the same was given on account of a debt, due, or supposed to be due, from A. W. Parsons to Fisk and Hollingshead, and given to meet a draft, given by Fisk and Hollingshead to F. M. Fisk; and whereas said Collins has paid me the amount of the said draft, I agree to obtain said draft, and hand the same over to the said Collins, so as to enable him to collect the same, provided the said Parsons is responsible in any way.

(Signed,)

F. M. FISK."

The plaintiff objected to the admission of this instrument of writing in evidence. The court overruled the objection, and the plaintiff excepted to the decision of the court on this point. The defendant, appellee, then called one George Anderson as a witness, who testified that the draft referred to in said last named instrument of writing, as given by said Miron Leslie on the said defendant for \$1000, and by him not accepted, was at the date of the instrument before recited, (December 6th, 1836,) and still is the property of the witness; that the same was in possession of the plaintiff, but obtained from witness' attorney in Illinois, on witness' order, and for his use; that the witness had a conversation with the defendant on Main street, in St. Louis, during which the plaintiff came up, and remarked, in answer to a question put to him by the witness, that he had obligated himself to obtain said first mentioned draft, and hand it over to the defendant; that during the said conversation, Fisk, the appellant, spoke of the defendant having made some arrangement for the satisfaction of the said draft of Leslie, by giving some paper, and witness understood something to be said about a note, or bill of Joseph Tabor.

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This testimony was also objected to by the plaintiff, appellant, his objection was overruled, and he excepted.

The appellant, plaintiff in this action, then, as rebutting evidence, offered and gave the testimony of one St. John, who testified that the bill of exchange herein before first named, was given by the defendant to the plaintiff in satisfaction, and for the purpose of taking up certain notes, amounting together to a larger sum than that specified in the said bill executed by the defendant to the plaintiff, and then due and unpaid, which had been placed by the plaintiff in witnesses' possession for collection; that the transaction in which the first mentioned bill of exchange was given, was an entirely different one from that referred to in the instrument of writing executed by the plaintiff, and given in evidence by the defendant, appellee; that the witness does not recollect all the particulars referred to in the last mentioned transaction, and cannot say what was the amount of the said Tabor's acceptance. The court found on this evidence for the defendant, and gave judgment accordingly.

The appellant moved to set aside the verdict, and to grant a new trial, for the following reasons: 1st, Because the finding of the jury is against the weight of evidence. 2d, Because the finding of the court is without evidence. 3d, Because the finding of the court is without evidence, and against law and evidence. 4th, Because the court admitted improper and illegal evidence at the trial.

The court overruled the motion, and the plaintiff excepted to the decision of the court.

The two points necessary to be decided here, are:

1st, Did the court commit error in admitting the evidence offered by the defendant?

2d, Did it err in overruling the motion for a new trial?

By the instrument of writing executed by Fisk, and given in evidence by Collins, to whom it was made, it appears that Fisk had sold a draft drawn on Collins by one Leslie, and which Collins had not accepted; this draft was for \$1000, and he by this agreement had obligated himself to procure this draft, and deliver it to Collins, the defendant in error, and drawer of the bill sued on, declaring that Collins had paid him the amount of such draft.

Anderson, witness of the defendant Collins, testified that the Leslie draft belonged to him, at the time Fisk gave his obligation to hand it over to Collins, and still belonged to Anderson, and that he had heard Fisk speak of Collins having made an arrangement with him for the said draft of Leslie, by giving some paper, and he understood some-

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thing to be said about a note, or bill of Joseph Tabor. This evidence certainly was admissible, under the plea of non assumpsit, to prove that the draft sued on, which had been accepted by Tabor, was obtained fraudulently, or without consideration. For it tends to establish the belief, that Fisk was privy to the drawing of the bill by Collins, and the acceptance of Tabor; for, says the witness, Fisk spoke of Collins having made some arrangement for the satisfaction of Leslie's draft, by giving some paper which the witness understood to be a note, or bill of Tabor. A jury might very well, on this evidence, believe that the bill sued on, was the bill drawn by Collins in favor of Munn & Lindsley, accepted by Tabor, and by Munn & Lindsley assigned to Fisk. Fisk gave rebutting evidence; and to which the most credit ought to be attached, it is not the province of this court to decide. Suffice it to say, that it is the opinion of this court, that the evidence offered by the defendant Collins was admissible.

The judgment of the circuit court must be affirmed.

FISK vs. TABOR.

ERROR to St. Louis Circuit Court.

The cause of action in this case is the same as that of Fisk vs. Collins. Collins was the drawer of the bill sued on, and Tabor the acceptor. The judgment here must be affirmed for the same reason.

WASH vs. RANDOLPH.

1. The six days given by the Statute for filing pleas, are six days on which the court is in actual session; and where a court adjourns over, the days on which it does not sit are not to be counted.

Wash vs. Randolph.

APPEAL from St. Louis Court of Common Pleas.

SPALDING & TIFFANY, for the Appellant.

POINTS AND AUTHORITIES.

1. The judgment by default was irregularly taken, and should have been set aside:

First, By our statute, Rev. Code, p. 458, six days are given to plead in term time.

Second, This must mean six days on which the court actually sits, because oyer can by law be craved of the instrument sued on, at any time during the period allowed for pleading, and craving oyer is one kind of plea. But oyer cannot be craved unless the court be actually sitting. 1 Tidd's Practice 530. That demand of oyer is a kind of plea, and should be made before the time of pleading is expired. Ibid 530-'1. The defendant has the same time in term to plead after oyer given, as he had at the time of demanding it. 8 Term. Rep. 356.

A. TODD, for Appellee.

POINTS AND AUTHORITIES.

1. The court did not err in refusing to set aside the judgment by default, because it was rendered after the sixth day of the term, and no cause was shown, but a denial of that fact. Revised Statute of 1835, p. 458, § 8, p. 460, § 31; 5 Mo. Rep. p. 386. Whether the court below erred depends upon the question, whether it was rendered after the sixth day of November term or not.

2. The court did not err in refusing to permit defendant to give evidence in mitigation of damages; that the negro Alsey had served plaintiff from the time of her purchase of defendant, till the termination of the freedom suit.

3. Wash did not move the court below to set aside the verdict, and grant a new inquiry.

TOMPKINS, J., delivered the opinion of the court.

William S. Randolph, suing to the use of Alfred Tracy, brought his

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action of covenant against Robert Wash. Judgment was given against Wash, and to reverse it, he appeals to this court.

From the bill of exceptions, it appears that the first day of the term to which the writ in this cause was returned, was the 20th day of November, 1843; that the court met on that day, and adjourned till Monday the 27th day of the same month, and that the court again met on Monday the 27th, and again adjourned till Monday the 4th day of December, then next, and on that day, the plaintiff Randolph, took judgment by default, against Wash, he having filed no plea; and on the 6th day of the said month, the defendant Wash moved to set the judgment aside for the following reasons, viz :

1st. That the term of pleading had not expired when said judgment by default was taken.

2. That the first six days of the term had not elapsed when the said judgment was taken, and has not yet elapsed.!

3d. That by law the defendant had six days of term time, within which to craveoyer of the writing declared on in this action, and that in fact he hath not as yet had that number of days for cravingoyer, the court not having set six days at the term aforesaid.

This motion was overruled. The plaintiff's damages were afterwards assessed. On the assessment of damages, the plaintiff gave in evidence a bill of sale, by which it appeared that Wash had sold to Randolph, the plaintiff in the suit below, appellee here, two slaves, covenanting that they were slaves for life; and it was in evidence that they had recovered their freedom by suit at law. Wash, the appellant in this action, offered to prove in mitigation of damages in this action, that the slaves had served said Randolph till the termination of the suit for freedom. The court of common pleas excluded this evidence, and Wash excepted to its opinion in this matter. No motion for a new trial was made in the court that tried the cause. There being no motion for a new trial on account of the exclusion of the testimony offered by Wash, this court, by its rules of practice long established, will not reverse the judgment on that account. See the case of Farrar vs. Blair, miscalled as appears in the report, Montgomery vs. Blair. Wash, Judge, delivering the opinion of the court, said : "If the jury or the court sitting as a jury, find a verdict without evidence, or on insufficient evidence, the proper course is to move for a new trial, and except to the opinion of the court, in refusing the motion." See 2 Mo. Rep. 189; and Higgins vs. Breen, adm'r decided at this term.

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We have nothing left then to be decided, but whether this judgment by default was properly taken.

The sixth section of the third article of the act to regulate practice at law, declares that every declaration and other pleadings shall be signed by the party, or his attorney, and the clerk shall endorse thereon the day on which it shall be filed, and if filed in term time, shall make an entry thereof on the minutes; and by the 8th section of the same article of that act, "Every plea to the merits of the action shall be filed on or before the sixth day of the term, at which the party pleading the same is bound to appear, if the term shall continue so long, and if not, then before the end of such term." By the 9th section, replications shall be filed within thirty days after the commencement of the term at which the defendant is bound to appear. Replications and other subsequent pleadings may be filed in vacation, because there is not, perhaps in more than one county, so much business at any one term, as will occupy a court for thirty days. The replication then, and subsequent pleadings, must have endorsed on them, the day on which they are filed by the clerk, when filed in vacation, and cannot be entered on the minutes. The declaration is necessarily filed in vacation; in order to enable the plaintiff to serve the defendant with process fifteen days before the return day; it is not then required to be entered on the minutes, for there can be no minutes when no court sits. But the pleas must be entered on the minutes, for by the 8th section they must be filed on or before the sixth day of the term, or before the end of the term, if it do not continue so long.

In this case the court met on the 20th day of November, 1843, and on the same day adjourned till the 27th day of the same month, and it is contended that the intervening days betwixt the 20th of November, and 27th of that month, are days on which pleadings ought to be filed, although no court was in reality sitting. How in this case could the clerk of the court enter on his minutes, a plea filed on the twenty-first, twenty-second, or twenty-third days of November, 1843, for they are some of the intervening days. He can certainly keep no minutes of the proceedings of a court, when no court is in session.

The 23d section of the act to establish courts of record, and prescribe their powers and duties, directs that "Full entries of the orders and proceedings of all courts of record of each day, shall be read in open court, on the morning of the succeeding day," &c. The plea filed on the 22d day of November, of that term, is a proceeding of that day. How could it be read on the morning of the twenty-third day, or how

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could there be any proceedings of a court, when there was no judge sitting to hold a court?

Each party has sought to connect with the argument of this cause, as it suited his interest, the propriety or impropriety of selling lands under execution, on the days intervening betwixt the days on which the court adjourns, and the day to which it adjourns. It is enough to decide what is before us, and it will be time enough to decide whether a sale on such a day be legal, when the case occurs. We do not wish to insinuate an opinion, even in such a case, but will be content with saying that when the circuit court, or other court of record adjourns for a week, we do not regard the days of that week on which it does not sit, as days on which defendants are required to plead, by the act to regulate practice at law. The judgment by default was taken too soon.

The judgment of the court of common pleas is therefore reversed.

TILGHMAN CLARK vs. STEAMBOAT MOUND CITY.

I. A party cannot be compelled to take a non-suit. It must be by his own consent.

APPEAL from St. Louis Court of Common Pleas.

CROCKETT & BRIGGS, for Appellant.

A. TODD, for Appellee.

TOMPKINS, J., delivered the opinion of the court.

This is an action commenced under the statute entitled, "An act to provide for the collection of demands against boats and vessels;" Digest of 1835, p. 102. Judgment was given for the plaintiff, and the defendant appealed to the court of common pleas. In this last court judgment was given for the appellant, the steamboat, and to reverse it, the cause is brought by appeal to this court.

The complaint is in the words following, to-wit: Tilghman Clark complains, that he has a demand against the steamboat Mound City, amounting to seventy-nine dollars and eighty-seven cents, which demand accrued against the said steamboat on account of the owners

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thereof, and is in all particulars, as follows, to-wit: "Due Mr. T. Clark, 79 87-100 dollars. March 10, 1843." It was signed by the clerk, &c.

The cause was submitted to the court, neither party requiring a jury. The plaintiff offered in evidence the note filed with the papers below, as follows: "Due Mr. T. Clark 79 87-100 dollars. March 10, 1843. (Signed,) Charles Barger, Clk." He proved that Charles Barger was clerk of the steamboat Mound City, while he served that boat, &c.

The defendant introduced no testimony, but moved the court to non-suit the plaintiff for defect in the plaintiff's complaint. The council for the plaintiff prayed leave to amend his complaint, and it was refused. The court then ordered a non-suit, although the defendant was present by his attorney. To this decision of the court the plaintiff excepted, and moved for reasons filed, to set aside the non-suit, and for a new trial, and for leave to amend the complaint. The motion was overruled by the court.

The counsel for the appellee, cites several authorities from New York Reports to show that the decision was correct. It is not deemed necessary to examine how courts of New York would decide in such a case. The common law is introduced by our statutes into this State, and by it no plaintiff can be forced to take a non-suit; the taking of a non-suit is a voluntary act. *Wells vs. Gaty* and others, decided at the last term of this court; where it is said the court cannot compel a plaintiff to submit to a non-suit, they may advise and direct him to be called, but if he refuse to suffer a non-suit, the court cannot otherwise protect and enforce their opinion, but by awarding a new trial, if the jury find against their direction. 5 Bacon, 140, Title, Non-suit, letter A; and Tidd's Practice 996.

It is an evasion of our own statute regulating practice in the Supreme Court, to order a plaintiff in the circuit court to submit to a non-suit. The 31st section of that act directs, "that no exception shall be taken in an appeal or writ of error to any proceedings in the circuit court, except such as shall have been expressly decided by the circuit court."

The counsel for the appellee, has in compliance with the 30th section of said act, Digest of 1835, p. 522, furnished the points on which he insisted, not one of which appears on the record to have been decided by the court of common pleas. This being the state of the case, this court will not undertake to say, that the complaint of the plaintiff was framed in compliance with the requisitions of the 4th section of the act, to provide for the collection of demands against boats and vessels,

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or that it was not, nor will it be decided whether or not the evidence given was admissible under that complaint. It is very easy to perceive how the court of common pleas, by ordering the plaintiffs in that court to submit to a non-suit, may save itself much trouble, while it evades the object proposed by the 31st section above referred to.

It was decided by this court, in the case of Camden & Co., vs. Steamboat Georgia, 6 Mo. Rep. 381, that the complaint in a cause instituted in the circuit court, might be amended like a declaration at common law. But the proceeding was commenced before a justice of the peace. It may be well for the appellant to consider, whether a complaint filed before a justice of the peace, can consistently be amended in the circuit court. We shall give no opinion, as the case has not come here in a manner to authorize this court to decide any point, other than the power of the circuit court to order a plaintiff to submit to a non-suit.

The judgment of the court of common pleas is reversed, and the cause remanded.

TILGHMAN CLARK vs. STEAMBOAT MOUND CITY.

APPEAL from St. Louis Court of Common Pleas.

TOMPKINS, J., delivered the opinion of the Court.

This case is in every material particular, like the preceeding case between the same parties, and is disposed of in the same manner.

PERRIN vs. WILSON.

APPEAL from St. Louis Court of Common Pleas.

LESLIE, for Appellant.

CARR, for Appellee.

TOMPKINS, J. delivered the opinion of the court.

Perrin brought his suit before a justice of the peace of St. Louis

Lewis Scott, (of color), vs. William Burd.

county, against Wilson and wife; the wife not being found, the suit was prosecuted against the defendant Wilson, and a judgment was rendered against him in the justices' court. An appeal was taken by Wilson, the defendant, to the court of common pleas of St. Louis county. There judgment being given against Perrin, he appealed to this court.

On the trial before the court of common pleas, the plaintiff, Perrin, gave evidence of a demand against the defendant, Wilson, for money charged to be due, on account of goods sold to the wife, while *sole*, and before marriage. After the evidence was given in the case, the record states, that by consent of the parties, the case was submitted to the court, and it appearing from the papers, (record) that the defendant's wife was not served with process; the court considered that the suit was against the defendant alone, and decided that the plaintiff be non-suited. The plaintiff excepted to this decision of the court. He afterwards moved to set aside this non-suit, and for a new trial. This motion was overruled, and the plaintiff excepted to this last decision also.

The judge of the court of common pleas derives no authority either from the common law, or from the statutes of this State, to compel a plaintiff in his court to take a non-suit. *Tilghman Clark vs. Steamboat Mound City*, decided at this term; and *Wells vs. Gaty, et al*, decided at the last term of this court.

The judgment of court of common pleas must be reversed, and the cause remanded.

LEWIS SCOTT, OF COLOR, vs. WILLIAM BURD.

ERROR to St. Louis Circuit Court.

SCOTT, J., delivered the opinion of the court.

The bill of exceptions in this case, having been stricken out of the record, on motion, for the reason that it was filed out of term time, and without the consent of parties, and no other point being made, but those growing out of the bill of exceptions, the judgment of the court below will be affirmed.

The St. Louis Perpetual Insurance Company vs. Goodfellow.

THE ST. LOUIS PERPETUAL INSURANCE COMPANY vs. GOODFELLOW.

1. A provision in the charter of a corporation, which requires, that "all rules and restrictions made by the Board of Directors, concerning the transfer of stock, shall be subject to the general law of the State," does not require such rules and restrictions, to be consistent with, and in conformity to, the general law governing the subject matter, to which the rules and restrictions apply. It only means that such rules and restrictions shall not contravene the general law of the State, other than that governing such matter, as the rules and restrictions are intended to govern, and shall be reasonable.
2. The provision of a charter declaring the stock of the corporation personal property and authorizing the Board of Directors to make rules and regulations, concerning the transfer of the stock, subject to the general law of the State, authorizes the Board to adopt a rule prohibiting the transfer of stock, until all debts due by the owner of the stock to the corporation shall be paid, although such rule is, inconsistent with the general law of the State governing the transfer of personal property.
3. The word "indebted," when used in a by-law or charter, restraining a stockholder from transferring his stock, while indebted to the company, applies to debts to become due, as well as to those due, and to those in which the stockholder is surety, as well as those in which he is principal.
4. A transfer of stock, made according to the general law governing the transfer of personal property, is good between the parties, though it be not as against the company.

APPEAL from St. Louis Circuit Court.

GAMBLE AND BATES, for Appellants.

SPALDING AND TIFFANY, for Appellees.

SCOTT, J., delivered the opinion of the court.

This was action on the case in tort brought by John Goodfellow, against the appellant, for refusing to enter in the books of the company, a transfer, and assignment of stock made to Goodfellow, by David Tatum. On a trial, on the general issue, there was a verdict and judgment for Goodfellow, for \$486 20, from which an appeal has been taken to this court.

It seems that D. Tatum, was the owner of twenty-five shares of stock in the St. Louis Perpetual Insurance Company, for which he had a certificate, dated May 1st, 1840, sealed with the company's seal, and attested, by its Secretary, and signed by the President. This certificate stated

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that the amount of each share, one hundred dollars, had been paid in and that Tatum was entitled to all the profits, dividends, rights and privileges, which belonged to these shares under the charter and by-laws, and that said stock was assignable and transferable on the books of the company, only in conformity to the provisions of the charter and by-laws thereof. On the 10th of May, 1842, Tatum made a deed of assignment for valuable consideration, to John Goodfellow, the appellee, for twenty-two of these shares. On the 13th of May, 1842, Tatum and Goodfellow, went to the office of the St. Louis Perpetual Insurance Company, presented the said certificate of stock, and said deed of assignment of twenty-two shares, and demanded a transfer of said shares on the books of the company, but none was made, or permitted. At that time, stock was worth at least eighty dollars a share, but at the time of trial, it had depreciated in value, and was worth perhaps fifty or sixty dollars. When the assignment of Tatum's stock was presented to be entered on the books of the company, Tatum was indebted to the company by several promissory notes, amounting to a sum greatly exceeding the value of the stock, in some of which he was the maker, and in others the endorser. There was some evidence that one of these notes, amounting to \$231 99, was for premiums of insurance; the others were the renewal of former notes. It appeared that the company discounted notes and bills of exchange, and bought and sold and dealt in bills of exchange, as a business, and employed certain officers entirely for that business, and kept a set of books in which these transactions alone were entered.

The act incorporating the appellant was read in evidence, from which it appears that the said company was entitled to the same powers, rights and privileges, as were granted and confirmed to the Farmers and Mechanics Insurance Company of St. Louis, the 9th section of whose charter enacted, that the stock of said company shall be considered personal property, and shall be assignable and transferable according to such rules and restrictions, as the board of directors shall, from time to time, make and establish; subject, however, to the general law of the State, as the same exists, or may be changed hereafter. The 8th section of said act, empowered the company to make and prescribe such by-laws, and regulations, as to them shall seem proper, touching the interest and business of said company. Session acts of 1836-7, 189, 215; Session acts of 1838-9, page 245: By the last cited act, the name of the appellant was changed, and made as it appears on the record in this cause.

A by-law of the company, (the appellant,) was given in evidence,

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which enacted that the stock of the company shall be assignable and transferable on the books of the company in St. Louis, and in such other places as the board may appoint agents for the purpose, personally by the stockholders, or by letter of attorney filed with the secretary or agent, upon the surrender of the certificate thereof, when a new certificate shall be issued therefor; provided, however, that no transfer by any person indebted to the company, shall be registered by the secretary or agent, while the holder is indebted to the company, unless the debt is satisfactorily secured. It was proved that Tatum had gone into bankruptcy.

The defendant asked the following instructions, which were refused:

1. If the jury believe from the evidence, that at the time of the demand made upon the defendant, to transfer the twenty-two shares of stock in question, David Tatum was indebted to the defendant, and did not pay, nor secure the payment of such debt, the defendant was not bound to make the transfer of the stock upon the books of the institution.

2. By the charter of the defendant, and its by-laws, the defendant was not bound to transfer the stock in question on its books, if David Tatum, at the time of the demand made, was indebted to the defendant, and did not satisfactorily secure said debt.

3. The paper given in evidence, purporting to be an assignment from David Tatum to John Goodfellow, of twenty-two shares of stock, is not in point of law any assignment or transfer of said stock.

4. If the assignment from Tatum to Goodfellow, did convey to Goodfellow the twenty-two shares of stock herein mentioned, the said Goodfellow is still the owner of said stock, for aught that appears in evidence in this case.

5. The law has not established any measure of damages in this case, but the amount of such damages must be determined by the jury, from a consideration of all the testimony before them.

The court then gave the following instructions:

1. The portion of the by-laws that undertakes to impose restrictions on the transfer of the stock, to enforce or secure the debts due from the stockholders to the company, is in contravention of law, and void.

2. The measure of damages, is the difference between the value of stock at the time the plaintiff sought to accomplish the transfer of it, and the time the action was brought, and interest until this time.

The main question in this cause is the right of the company to pass the by-law which restrains a stockholder from transferring his stock, until all debts due by him to the company are paid or secured. The

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only provisions in the charter which can be regarded as affecting this question, are those above cited, contained in the 8th and 9th sections of the act by which the powers of this company are defined. The ninth section being confined exclusively to the subject of the stock of the company, we will be warranted in saying that all that was intended to be enacted in relation to that matter, is comprehended in its terms; and that the general words of the 8th section are applicable to other by-laws than those which concern the transfer of stock.

It is clear that the company has power to prescribe rules, and impose restrictions on the transfer of stock; but these rules and restrictions must be subject to general law. In saying that the rules and restrictions should be subject to the general law, the legislature could not have intended that they should be consistent with, and in conformity to the law of the State governing the subject matter, concerning which the by-laws were to be enacted. The stock of the company is declared to be personal property. By the general law, property of that kind may be transferred by mere delivery without writing, or by deed, without delivery of the property, and in all places; now, it would be impossible for the corporation to make other rules, or impose other restrictions, under this power to regulate the transfer of stock, without coming in conflict with the law of the State regulating the transfer of personal property. Such a construction would make the provision relative to the transfer, a *felo de se*. Some other interpretation of its words, such a one as gives them effect, must be sought for. In requiring rules and restrictions relative to the transfer of stock to be subject to the general law, it could only have been contemplated by the Legislature, that they should be reasonable, and not contravene the general laws, other than that relative to the subject about which they are prescribed; for it is a principle of our jurisprudence, that all by-laws must be reasonable and not repugnant, or contrary to the general law: a construction which would require them to be consistent with, and in conformity to the law regulating the particular subject about which they are made, would prevent the enactment of by-laws in relation to it. So the validity of the by-law will depend on its reasonableness, and its conformity to the general laws, other than that concerning the transfer of personal property. Is it reasonable that a corporation should refuse to register a transfer of its stock, made by a stockholder, until the debts he owes it are paid or secured? The public has a concern in the solvency and security of these institutions, and the means should be allowed them to indemnify themselves against losses. Their capital stock is regarded as held in trust for the payment of the corpo-

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rate debts. *Angel & Ames on Corporations*, 475. The law tolerates a preference amongst creditors. The restriction imposed on the transfer of the stock of the company, is like giving a right of set-off against those who may be indebted to it. If an individual holds the money of another, the person entitled to it can make no transfer or assignment of the money to another, which will deprive the depository of his right of set-off, against debts due before notice of the assignment. The dividends on stock accruing after an assignment, and before notice thereof, may be retained by a corporation against the assignee, to be applied in payment of a debt actually due from the assignor at the time of notice of the assignment. *Bates vs. New York Insurance Co.* 3 John-cases, 238.

The argument that a right of creating a lien on stock for the payment of debts due by stockholders to the corporation, is usually conferred in express terms by the charter, shows at least that the exercise of such a power by incorporated companies, is deemed wise and politic by the Legislature; and while such enactments may negative the existence of the right without them, yet they show that courts would be warranted in inferring its existence from general words in a charter. The right of enacting a by-law imposing a lien on stock, for the payment of debts due by a stockholder, when confined in its operation to members of the company, is not denied. *Angel & Ames on Corporations*, 296-7. It is only when such by-laws affect third persons having no notice of them, that their reasonableness is questioned. And different opinions have been entertained in regard to the propriety of by-laws of the latter description. *McDowel vs. Bank of Wilmington*, 1 Harrington, Del. R. 27; *Nesmith vs. Bank of Washington*, 6 Peck, 329; *Angel & Ames*, 297, 2 *Pierre Williams, Child vs. Hudson Bay Company*, 207. It is a rule, that whatever will put a party upon inquiry, is notice, and as no person would have purchased the stock without evidence of the title of the vendor, the form of the certificate would have shown a purchaser, that he took it subject to the rules and restrictions imposed by the by-laws of the company. Be this as it may, the words of the charter were sufficient to empower the corporation to pass such a by-law; and as the wisdom and policy of such a power may be inferred from the frequency with which it is entrusted to incorporated companies in express terms, we cannot say that the company violated its duty in imposing the restriction complained of on the right of transferring its stock.

The word *indebted*, when employed in a by-law or charter, restraining a stockholder from transferring his stock while indebted to the com-

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pany, applies as well to debts to become due, as to those which are actually due, and as well to those owing by the stockholder as surety, or endorser, as to those in which he is the principal debtor. "The time of negotiating a loan, is the period the directors must look out for security; the fact that a borrower, or his endorser, is a stockholder, may induce them to be less attentive in taking security than they would otherwise be. Angel & Ames, 445, 295; 15 Serg. & Raw. 140.

As to the point that the indebtedness of Tatum to the company, did not grow out of its lawful business, it does not appear from any thing contained in the record, that this question was raised in the court below. There was evidence showing that the company was engaged in discounting notes, and buying and selling bills of exchange, but as it was empowered to loan on interest, its surplus or unemployed capital, or money, upon personal or real security, and to do and perform all necessary matters and things connected with this object (sec. 5,) we will not undertake to determine how far this provision warranted its conduct, or whether it afforded any justification for it; but as the cause will be remanded for another reason, it is deemed proper to withhold an expression of opinion on this subject, until it is fairly and fully brought before the court.

The instruction which prayed the court to declare to the jury, that the assignment from Tatum to Goodfellow was not in point of law any assignment or transfer of the stock, did not contain a correct legal principle. As between the parties to the instrument, it was valid and binding, and conveyed all the right of Tatum to the stock. The provisions in charters or by-laws, which require a transfer of stock to be registered on the books of the company, is made for its benefit, that it may know to whom dividends are payable, who are entitled to vote, and that it may secure any lien it may have on the stock, for the payment of debts due by a stockholder. These being the objects of such provisions, it seems to be well settled that a transfer is binding between the parties to it, and passes all the right of the party making it, although it may not be registered on the books of the company. Union Bank vs. Laird, 2 Whea.; Bank of Utica vs. Smalley, 2 Cow; Sargent vs. Franklin Insurance Co. 8 Peck, 90. As to the injury to the assignee of the stock, when the company unlawfully declines to register the transfer, consists in refusing to recognize him as a member, in not allowing him to vote, and in depriving him of his dividends, he has a right of action against the corporation for the value of his shares, as he is denied all the advantages resulting from the ownership of them.

Neither the instruction given, nor that refused, was a correct expo-

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sition of the law as to the measure of damages in actions of this kind. There having been no increase of the price of the stock after the refusal of the company to register the transfer thereof, we do not feel ourselves called upon to determine how that circumstance might have affected the rule as to the measure of damages. The value of the stock at the time of the refusal to transfer, under the circumstances of this case, must give the measure of damages. *Sargent vs. Franklin Insurance Company*, 8 Pickering Rep. 100; *Clark vs. Pinney*, 7 Cowen, 681.

Judgment reversed and cause remanded.

DICKSON vs. ANDERSON & THOMPSON.

1. All the parties to a deed are estopped from denying the recitals therein.
2. The recital in a deed of conveyance of the payment of the consideration, is in the United States, held to be an exception to the rule.

APPEAL from St. Louis Court of Common Pleas.

GEYER & DAYTON, for Appellants.

SPALDING AND TIFFANY, for Appellees.

SCOTT, J., delivered the opinion of the court.

Anderson and Thompson recovered a judgment in a justices' court against James McFarlane, on which an execution issued, and was levied on the property of McFarlane. McFarlane gave a bond for the delivery of the property on the day of sale; which bond was executed by Chas. K. Dickson, the appellant, as security for McFarlane. The bond recited that the execution had been levied upon certain property of James McFarlane, describing it, viz: twelve pieces of jeans, containing three hundred and forty-five yards, and four pieces of broad cloth, containing twenty-five yards, of the value of one hundred and fifty dollars. On the day appointed for the delivery of the property, Dickson,

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the security in the delivery bond, claimed the property as his own, and a jury was summoned to try the right to it, who were not able to agree on the verdict. The property was not delivered according to the tenor of the bond, and the constable returned it as forfeited, to the justice, who afterwards, in pursuance of law, rendered judgment thereon against McFarlane and Dickson for the debt, interest and costs. From this judgment an appeal was taken by Dickson to the St. Louis court of common pleas, where on trial *de novo*, Dickson offered to prove that the property levied on, and for the delivery of which the bond had been given, was his own, and not the property of McFarlane. This evidence was rejected by the court, to which an exception was taken, and properly saved. Judgment was again rendered for Anderson and Thompson, from which Dickson has appealed to this court.

The only point saved by the bill of exceptions, is the propriety of rejecting the testimony offered by Dickson, to show that the property described in the delivery bond was his.

In regard to recitals in deeds, the general rule is, that all parties to a deed are bound by the recitals therein, which operate as an estoppel. *Shelly vs. Wright*, Willes 9; the *Marchioness of Annondale vs. Harris*, 2 P. Wms. 432. There are cases maintaining the distinction that the rule estopping a party by a recital in a deed, applies to those instances where he has alleged some fact in his own knowledge, and not to those, when from the nature of the fact recited, it is apparent that the knowledge of it was obtained from a party making use of the recital against him. *Hayne vs. Maltby*, 3 D. & E. 438; *Miller vs. Bagwell* 3 McCord. The recital of the payment of the consideration money, in a deed of conveyance, seems in America, contrary to the law as settled in the English courts, an exception to the rule of the conclusions of recitals in a deed. *Cowan & Hills' notes* 1, 217; *Greenleaf* 32. It was a fact certainly within the knowledge of Dickson, whether the property mentioned in the delivery bond was his or not, and having entered into a deed reciting that it was the property of McFarlane, we think there is no hardship, but on the contrary, manifest justice, in saying that he was estopped from denying the fact.

Judgment affirmed.

Dorsey vs. Hardesty.

DORSEY vs. HARDESTY.

1. The nature and effect of a contract, depend upon the law of the State in which the contract is made, or is to be performed; and the form of action given as the remedy for a breach of the contract, upon the law of the State in which the remedy is sought.)
2. An instrument of writing which our laws regard as sealed, though executed in a State in which the law would not so regard it, is, so far as the remedy to enforce such contracts is concerned, to be regarded as sealed in our courts.
3. A plea of the statute of limitation without affidavit, under the act of Feb'y 27th, 1843, is bad, and may be stricken out on motion.

ERROR to St. Charles Circuit Court.

GAMBLE & BATES, for Plaintiff in error.

C. D. DRAKE, for Defendant in error.

SCOTT, J. delivered the opinion of the court.

This was an action of debt on three several bonds executed by Loyd Dorsey to Jones and Hardesty. The suit was brought by Hardesty as surviving partner, and judgment was recovered by him; to reverse which this suit was prosecuted.

The bonds on which suit were brought, were executed in Maryland, and had scrawls affixed to them by way of seals, and the scrawls were recognized as seals in the body of the instruments. The pleas were *non est factum*, and set-off, and the statute of limitations was pleaded in bar of a recovery on one of the bonds. This plea was not verified by affidavit, for which reason it was on motion stricken out.

Upon this state of facts on the trial, the defendant objected to reading the bonds in evidence, on the grounds of variance; that being executed in Maryland, it did not appear that such instruments were by the law of that State regarded as sealed; and that at common law no instrument was regarded as sealed, that was not actually so; that "*sigillum est cera impressa, quia cera, sine impressione non est sigillum*," was the principle of the common law. The court overruled this objection, and permitted the bonds to be read in evidence. This is assigned for error. In the case of Broadhead, admr., vs. Noyes, decided at the present term of the court, it was held that the *lex fori* determined the remedy, and that although the validity, nature and construction of a contract were ascertained by the law of the place where it was executed or to be

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performed, yet the law of the *forum* where the suit is brought, will give the remedy. These instruments being regarded as sealed, by our laws, it is immaterial in what light they were regarded by the laws of Maryland, as the remedy upon them according to the foregoing principle, must conform to our laws.

The 8th section of the act to simplify proceedings at law, passed Feb. 27, 1843, enacts, "that hereafter, no special plea shall be filed in any action founded on contract, expressed or implied, unless such special plea be verified by the affidavit of the defendant, or some person on his behalf." There are three descriptions of pleas in bar: the general issue, a denial of a particular allegation in the declaration, and a special plea of new matter not apparent on the face of the declaration.—It is always essential to plead specially, where new matter was brought forward by way of defence, and the defendant admitted all the plaintiff's allegations, but denied or avoided their operation. Chitty, 508, 546. It is obvious that according to these principles, a plea of the statute of limitations is a special plea. It admits the plaintiff once had a cause of action, and sets up new matter in avoidance of it. In personal actions the statute of limitations is always pleaded. The court committed no error in striking out the plea of the statute of limitations, or in refusing to re-instate it.

Judgment affirmed.

WELLES vs. BIDDLE.

1. A judgment of non-suit cannot be entered against a party without his consent.

ERROR to St. Louis Court of Common Pleas.

PRIMM, TAYLOR AND LESLIE, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. It is respectfully submitted that the St. Louis court of common pleas committed error in non-suiting the plaintiff, because the authorities are conclusive, that courts will not refuse to try actions like the

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one the evidence in the bill of exceptions presents, on the ground of the same being an idle waste of time. 21 Com. Law Rep. p. 213, and notes; 3 Price's Rep. p. 212.

2. There is nothing whatever in the record shewing a gaming transaction, as contemplated by our statute. Rev. Code, p. 290.

3. The subscribers were tenants in common of the property in question, and the means resorted to to make partition of their property was lawful, there being nothing immoral, either in the application of the proceeds, or the means of determining the ownership of the same.

4. An agent or stakeholder is liable to the winner, and cannot set up the illegality against the claim of his principal. The defendant in error was in this situation as to the property, and parties in question.—16 Com. Law Rep. page 276, and authorities there cited in note 15, Ib. 204.

SPALDING & TIFFANY, for Defendant in error.

POINTS AND AUTHORITIES.

1. The raffle was a "*game, or gambling device,*" within the meaning of the act of Assembly restraining gaming. See Rev. Code, 290; 4 Missouri Reports, 536. That horse racing is a *game* within the meaning of our statutes to restrain gaming.

This decision was under the old revised code of 1825. See p. 409.

The court also decide that a bond given to secure payment of a forfeiture for failing to run the race, was against the policy of the law, and therefore void. 4 Mo. Rep. 599, Boynton vs. Curle. In this case the same principle is decided.

Betting upon the throw of dice seems to be a *game*, and more appropriately so called than a horse race.

2. If the raffle, or winning by throwing dice, be *gaming* within the meaning of that act, then it follows that the title of property could not be changed thereby.

The first section enacts that any money or property won at any gambling device, may be recovered back by action, &c. And the third section provides that all bonds, bills, notes, &c., given for a gambling consideration shall be void.

These provisions, in effect, make the contract null, and prevent the change of title. For if the party losing the chairs could, even after they had been delivered, recover them back by suit, certainly the title still remained in him: and if the enforcing of the forfeiture incurred for fail-

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ing to run a horse race, be against the policy of the act, so must be the enforcing of the change of title of the property won by a gaming device.

If Wells can succeed here, and recover the chairs, a suit could be brought against him by the party from whom they were won, founded on the first section of the act, and the chairs recovered back.

TOMPEINS, J. delivered the opinion of the court.

George W. Wells brought an action of detinue against Anne Biddle, in the St. Louis court of common pleas, and judgment being there given against him, he appealed to this court.

On the trial of the cause some evidence was given, as is seen from the bill of exceptions. When the evidence was closed, it is stated in the bill of exceptions, that the court directed a non-suit to be entered against the plaintiff, which was accordingly done. To this decision of the court the plaintiff excepted. The plaintiff then moved to set aside the non-suit, and the motion being overruled, he excepted to that decision of the court. In the case of *Welles vs. Gaty et al*, decided at the last term, and in *Clark vs. Steamboat Mound City*, and *Perrin vs. Wilson*, and many others, decided at this term, this court reversed the decisions of the court of common pleas, because it had directed a non-suit to be entered up against the plaintiff, against his will. For the same reason this judgment will be reversed. See the case of *Welles vs. Gaty et al*, and the authorities there cited.

The judgment of the court of common pleas is reversed and the cause remanded.

HARRISON vs. THE BANK OF ILLINOIS.

1. Where a judgment of non-suit is rendered against a party, and no exception to that judgment is taken, it will be presumed that the non-suit was voluntarily taken, and it will not be set aside.

APPEAL from St. Louis Court of Common Pleas.

LEONARD & BAY, for Appellant.

Harrison vs. The Bank of Illinois.

POINTS AND AUTHORITIES.

1. The court of common pleas had no power to enter judgment of non-suit, after the cause was submitted to court. R. S. of 1835, title "Practice at Law," art 4th, sec. 24.

2. The appellant proved all that it was incumbent on him to prove, in order to maintain his action on the draft.

3. The draft, though not a bill of exchange within the meaning of our statute, is still admissible in evidence under the money counts.

GEYER & DAYTON, for Appellee.

The appellee insists that there is no error in the judgment of the court below, and relies upon the following points:

First. In relation to the \$100 bill, that there could be no recovery on account of that for the following reasons:

1st. There was no proof of authority on the part of Ridgely and Mather to sign that bill, so as to bind the bank.

2d. There was no proof of demand, and refusal of payment at the bank.

3d. There was no proof that the plaintiff was owner of the bill at the commencement of this suit.

Second. In relation to the draft. First, that there could be no recovery upon that under the special count.

1st. Because the draft was not a negotiable instrument.

2d. Because there was no consideration alleged in the special count, or proven for the promise set up in that count.

3d. Because that count contained no averments of the value of current bank notes.

4th. Because allegations of that count were not proven.

TOMPKINS, J., delivered the opinion of the court.

James Harrison brought his action of assumpsit in the court of common pleas of St. Louis county against the State Bank of Illinois, and that court having given judgment against him, he appealed to this court.

On the trial of the cause, much evidence was given. After the evidence was closed, the cause, as appears from the bill of exceptions, "was submitted to the court, who thereupon gave judgment of non-suit." The plaintiff then moved to set aside the judgment of non-suit:

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his motion was overruled, and he excepted to the decision of the court overruling his motion. As the plaintiff did not except to the decision of the court when it gave judgment of non-suit against him, it must be supposed that he voluntarily submitted to a non-suit. He moved afterwards to set aside this non-suit, and the court overruled his motion. Had the plaintiff excepted to the decision of the court giving judgment of non-suit, this court would have reversed the judgment of the court of common pleas, as was done in the case of Welles vs. Gaty et al, decided at the last term of this court, and of Clark vs. Steamboat Mound City, and Perrin vs. Wilson, decided at the present term. But as the plaintiff did not take his exception to that decision of the court of common pleas, the non-suit must be supposed to have been voluntary, and consequently the judgment of that court must be affirmed.

 PRATTE & CABANNE vs. CORL.

1. On an appeal from a justices' court not taken on the day of trial, the court cannot render judgment by default against the appellee, unless notice in writing of the appeal has been served upon him at least ten days before the first day of the term.
2. On a judgment by default, the court cannot assess the damages, unless the suit be founded on an instrument in writing, by which the demand is ascertained.

APPEAL from St. Louis Court of Common Pleas.

EAGER & HILL for Appellant.

GANNT, for Appellee.

TOMPKINS, J. delivered the opinion of the court.

John H. Corl sued Julius H. Cabanne and Bernard Pratte, on an account, before a justice of the peace, and judgment being given against him by the justice, he appealed to the court of common pleas of St. Louis county. That court gave judgment in favor of Corl, against the defendants, Pratte and Cabanne, and to reverse it they appeal to this court.

The verdict and judgment of the court of common pleas is in the words following, viz: "And now at this day comes the plaintiff by his

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attorney, and submits his cause to the court, which being heard, and the court being sufficiently advised of, and concerning the premises, doth find that the defendants do owe the said plaintiff the sum of ninety dollars. It is therefore considered by the court, that the said plaintiff recover of said defendants the sum of money aforesaid, by the court found to be due and owing, and also his costs, &c."

By the bill of exceptions, it appears that the defendants in this cause being called on, did not appear, and the cause being submitted to the court sitting as a jury, by the plaintiff, a verdict and judgment were given for him, and the defendants filed a motion for a new trial, for reasons also filed. Two of these reasons only are thought material to be noticed. The first is, because the trial was by the court and not by a jury; 2d, because the plaintiff was the appellant, and the appeal was taken four days after the trial before the justice, and no notice of the appeal was served by the plaintiff, appellant, on the defendants, appellees. The motion to set aside this judgment was overruled, and the defendants, having excepted to the decision of the court of common pleas, appealed to this court.

The 8th section of the 13th article of the State Constitution, declares "that the right of trial by jury shall remain inviolate;" and the 15th section of the 4th article of the act to regulate practice at law, that the trial shall be by the court, when neither party shall demand a trial by a jury, and the cause is not referred; and that when either party shall demand a trial by jury, it shall be so tried. This provision in the act to regulate practice at law, evidently supposes both parties to be present, and in a situation to make an election of the mode of trial. But in this cause, it does not appear from the judgment itself, that the defendants were present, and it appears from the bill of exceptions, that they were not present. The judgment then was a judgment by default, and in such case, the 35th section of the 3d article of the act to regulate practice at law, in express terms directs that "the damages shall be assessed by a jury empannelled in the court for that purpose, when the suit is not founded on an instrument of writing, by which the demand is ascertained." But this suit was founded on an account. The court of common pleas then violated by this decision, the provisions of the 35th section of the 3rd article of the act to regulate practice at law, and in this committed error.

2d. The appeal was taken four days after the trial before the justice of the peace, and the plaintiff, appellant, gave no notice in writing of the appeal.

The 14th section of the 8th article of the act to establish justices'

 Pratte & Cabanne vs. Corl.

courts, provides that, "If an appeal be not allowed on the same day on which the judgment is rendered, the appellant shall serve the appellee, at least ten days before the first day of the term at which the cause is to be determined, with a notice in writing, stating the fact that an appeal has been taken from the judgment therein specified." It is not pretended that any notice in writing has been given. But it is contended that Pratte and Cabanne, appellants to this court, have done acts amounting to a waiver of notice; that is to say, that Pratte & Cabanne had summoned the plaintiff Corl, and other witnesses, to appear and testify in this cause. The statute commands the party appealing, in terms the most explicit, to give the appellee notice in writing ten days at least before the first day of the term at which the cause is to be determined; p. 3, 71 of the Digest of 1835 above cited. But admitting for a moment the fact of the summoning of the plaintiff by the defendant, appellee, or the summoning the defendant by the plaintiff, appellant, for each summoned the other, as appears on the bill of exceptions, were equivalent to the written notice required by the statute above mentioned, it appears from the subpoenas themselves, that the trial was to take place on the 23d of October, 1844, and one subpoena is dated on the 17th, another on the 18th, and the third on the 22d October, of the same year; the earliest date of the three, only five days before the return day, and the law requires ten days notice in writing, stating the fact, that an appeal has been taken from the judgment therein specified. Now if it were admitted that these facts, that the defendant had summoned the plaintiff, or that the plaintiff had summoned the defendant to testify, were equivalent to a notice in writing of the appeal taken by the plaintiff four days after the justices' trial, still the time of the implied notice, is but half as long as the 14th section above cited requires. This extravagant proposition is attempted to be maintained on the authority of cases decided by this court. The first of these cases, relied on by the appellants, is *Whiting, et al, vs. Budd*, 5 Mo. Rep. 443, in which it was decided that "in assumpsit against A. & B. and attachment against their goods, they not being served with process, if they however come in on the 12th day of the term, and file a motion to dissolve the attachment, this motion is a sufficient appearance in court to authorize the same steps as though they had been duly summoned." The second case was that of *Atwood vs. Reyburn*. This was a suit commenced before a justice of the peace, by Reyburn against Atwood. The summons was returned served by the deputy constable, the name of principal not being subscribed to the return, but that of the deputy. Atwood appeared and made defence, and judgment going against At-

Samuel vs. Withers & Bristow.

wood, he appealed to the circuit court, and the cause was tried before the circuit court, Atwood appearing and defending. The circuit court decided the cause against him, and he assigned this defective return of the deputy constable, as an error for which, as he contended, the judgment of the circuit court ought to be reversed. This court decided that after twice appearing in compliance with the summons and defending the cause, he should not be permitted to contest the correctness of a return which he had twice waived. The acts of the defendants in both of the cases, by which it was decided that they had waived the want of notice, were acts of record in the court. The acts of the party in this cause, by which it is contended that they had waived notice of the appeal in writing, were matters in *pais*, to wit: the issuing of a subpoena, and the subpoena was issued only five days before the first day of the term, when the law required the notice to be served at least ten days before the first day of the term, as well as to be in writing. But the appellant contends, that as the appellees did not apply under the 15th section of the 8th article of the said act, for a continuance of the cause, they will not be permitted now to contend that the appellant had not a right to take a judgment at the return term. This would all be very true, if the appellees had appeared in court and taken any step in the cause; that is to say, had they appeared and agreed to submit the cause to be tried by the court, or to be tried in any of the three modes prescribed by the law. But even if the appellant had given the notice required by law, the judgment ought to be reversed, because the suit not being founded on an instrument of writing by which the demand is ascertained, the court did not empanel a jury to assess the damages.

Because the appellants did not give the appellee ten days notice in writing, of the appeal taken by him four days after the trial by the justice; and because the court did not empanel a jury to assess the damages, the suit not being founded on an instrument of writing by which the demand is ascertained, its judgment is reversed.

SAMUEL vs. WITHERS & BRISTOW.

1. The judgment of the Circuit Court will not be set aside for erroneous instructions, unless the bill of exceptions shews the evidence upon which the instructions were based.

Samuel vs. Withers & Bristow.

2. Nor will its judgment be reversed for admitting the testimony of an incompetent witness, unless his testimony is shewn, as it might be, immaterial.

ERROR to Boone Circuit Court.

TURNER & HAYDEN, for Plaintiff.

TODD & LEONARD, for Defendants.

NAPTON, J. delivered the opinion of the court.

This was an action of debt upon a note given by the defendants, and one Clarkson, to John Hall, who assigned the same to Manlius V. Thompson, who assigned the same to plaintiff. Judgment by default went against Bristow, the principal in the note. The general issue was pleaded with notice of special matter.

Upon the trial the defendant offered to read the depositions of Bristow and Clarkson, in his defence, which was objected to on account of the incompetency of the witnesses, but the objections were overruled and the depositions read. The plaintiff asked the court to give several instructions which the court refused, and the court gave the instructions asked for by the opposite party. Thereupon by leave, the plaintiff submitted to a non-suit, and moved to set the same aside, which was refused, and the case brought here by writ of error.

The depositions of Bristow and Clarkson, are not preserved in the record; the bill of exceptions alludes to them as papers in the cause, but they are not copied in the bill. Depositions can only be made a part of the record by a bill of exceptions. That they are transcribed by the clerk in the record proper, is of no consequence, and does not make them a part of the record.

The points upon which the reversal of the judgment is sought are two: *First*, the incompetency of Bristow as a witness; and, *Second*, the erroneous instructions of the court.

It is manifest that the propriety of the instructions, must depend upon the facts on which these instructions were based, and the evidence not being before the court, we cannot enquire into the matter, neither would this court be authorized to reverse a judgment, because an incompetent witness had testified on the trial, when the testimony of such witness is not preserved. It would be impossible to see whether his testimony was at all material to the merits. The opinion of this court upon that point is, however, given in the case of Garrett and others, vs. Breckenridge, decided during the present term.

Judgment affirmed.

West, Assignee of Maloy, vs. Miles.

WEST, ASSIGNEE OF MALOY, vs. MILES.

1. The court cannot enter up a judgment, on the finding of an issue made under the provisions of the 11th sec. of the act of February 15th, 1841, entitled "An Act relating to assignments for the benefit of creditors."
2. Such a finding is not subject to an appeal, or a writ of error.
3. The Supreme Court will take cognizance of an erroneous judgment of an inferior court, although no motion to set aside such judgment be made in the inferior court.

APPEAL from St. Louis Court of Common Pleas.

GAMBLE & CARROLL, for Appellant.

ALBERT TODD, for Appellee.

NAPTON, J. delivered the opinion of the court.

The plaintiff in error, under the provisions of the 11th section of the act of February 15th, 1841, entitled, "an act relating to assignments for the benefit of creditors," certified to the circuit court of St. Louis county, a claim of the defendant in error, against Maloy, for goods furnished, and money advanced to the amount of about ten thousand dollars. The cause was transferred to the court of common pleas, where after trial before the court, neither party requiring a jury, the plaintiff obtained a verdict for \$7,824. The defendant moved the court to set aside the verdict and grant a new trial, for various reasons specified in the motion, but the motion was overruled, and judgment was given against the plaintiff in error, for damages and costs.

To reverse this judgment a writ of error has been brought.

It seems to be conceded that the judgment of the court of common pleas was erroneous; but it is argued that a motion to set aside this judgment in the court below, was necessary before the irregularity could be taken advantage of by writ of error. The decisions of this court have been otherwise; and it has been uniformly held, that a final judgment of an inferior court may be reversed, whether the error of that court was excepted to below or not. Carr & Co. vs. Edwards, 1 Mo. Rep. 137; Hempstead, and others, vs. Stone, 2 Mo. Rep. 541; Hayton vs. Hope, 3 Ib. 53; Maupin vs. Triplett, 5 Ib. 422.

Inasmuch as the court erred in entering up judgment upon the verdict found, it is obvious that this court cannot re-examine the propriety of

Bryant vs. Durkee.

the finding. The issue directed by the statute seems similar to a feigned issue, directed by a court of chancery, and is merely to ascertain a fact, and for the information and government of the assignee, and can no more be the subject of an appeal, or writ of error, than the verdict of the assignee himself, where no such aid from the court is requested.

Judgment reversed and cause remanded.

BRYANT vs. DURKEE.

1. A note made payable to "D," agent of the proprietors of the town "S," is payable to "D" individually, and not as agent.

APPEAL from Adair Circuit Court.

VAN ARSDALL, for Appellant.

JAMES S. GREEN, for Appellee.

TOMPKINS, J., delivered the opinion of the court.

Chancy Durkee commenced his suit by petition in debt, in the circuit court of Adair county, against Archibald S. Bryant, on two instruments of writing executed by the defendant Bryant, and another, and made payable to said Durkee, agent for the proprietors of the town of Sand Hill. Judgment was given for the plaintiff. The defendant moved in arrest of judgment, and assigned that the judgment was entered up in favor of Durkee individually, and not as agent for the proprietors of the town of Sand Hill. His motion was overruled, and to reverse the judgment of the circuit court he appeals to this court.

The appellant, by making his instruments of writing here sued on, payable to Durkee, the appellee, admitted that he was payor of the instruments of writing. The proprietors of the town of Sand Hill, whoever they may be, can never sue the appellant on these writings. A recovery by their agent, is a good bar to any action by them for the same cause. And indeed it is quite immaterial to the appellant whether there be any proprietors of the town of Sand Hill. If, indeed, here be any proprietors of that town, other than Durkee himself, he admits by suing as their agent, that the money recovered in this action

Robert, (a man of color,) vs. Melugen.

is for their use; and the defendants, by making the note payable to Durkee, admit their liability to him. At most, it is a mere *descriptio personæ*, not necessary to insert, and it might be rejected as surplusage. *Freeman & Snowden vs. Campden et al*, 7 vol. Mo. R. 298.

The judgment of the circuit court of Adair county is affirmed.

ROBERT (A MAN OF COLOR,) VS. MELUGEN.

1. A slave can only be emancipated in Missouri by an instrument of writing executed in accordance with the act of 1835.
2. The admissions, or declarations of a person holding another in slavery, as to the residence of the slave in Illinois, cannot be given, until a foundation for such testimony is laid by proof of such residence with the consent of the owner.

APPEAL from Jasper Circuit Court.

TOMPKINS, J., delivered the opinion of the court.

Robert, a person of color, brought his suit for freedom, against Samuel Melugen, in the circuit court of Jasper county. Judgment being given against him there, he appealed to this court.

On the trial of the cause, evidence was given that James Pharis, then deceased, who had claimed the plaintiff as his slave, and of whom this defendant is administrator, had in his lifetime frequently said that he wished the plaintiff, Robert, to be free, because he had been a faithful slave; that he died from home, and that these declarations were made in his last sickness; and that he was prevented by those about him in his last sickness, from making a will. This evidence was excluded from the jury on the motion of the defendant, and the plaintiff excepted to the opinion of the court. The plaintiff then asked a witness to state what he had heard Pharis in his lifetime say about the plaintiff being a free man. The defendant objected to the question; the court sustained the objection, and the plaintiff excepted to this decision of the court. Another witness was asked by the plaintiff to tell what he had heard any one say in the presence of Pharis in his lifetime, about the plaintiff having been in the State of Illinois. This question was objected to by the defendant, and the plaintiff excepted to the opinion of the court sustaining the objection. The plaintiff then

Robert, (a man of color,) vs. Melugen.

took a non-suit, with leave to move to set it aside, and afterwards on the same day, did move to set it aside. His motion was overruled, and he excepted to the decision of the court overruling his motion.

The plaintiff rests his claim to reverse this judgment on two points:

1st. That Pharis, the intestate of the defendant in this action, had in his lifetime frequently declared his intention that Robert, the plaintiff, should be free after the death of him, the intestate, and was anxious to have made his will to that effect, but was prevented from doing so, by those attending in his last illness.

2d. That the plaintiff had acquired a right to freedom by a residence in the State of Illinois, with the consent of the intestate, which residence the plaintiff's counsel in his brief states the plaintiff offered to prove.

1. The act concerning slaves provides, that any person may emancipate his slave by last will, or any other instrument of writing, under hand and seal, attested by two witnesses, and proved in the circuit court of the county where he or she resides, or acknowledged by the party in the same court. Section 1st of article 2d, p. 587, of the Digest of 1835. The 5th section of that article provides, that every person emancipating a slave shall cause to be delivered to him a copy of the act of emancipation, attested by the clerk, and the seal of the court in which the act was proved or acknowledged. The sixth section of the same article provides that, "where the emancipation has been by last will, the executor or administrator of the testator, shall cause to be delivered a copy as is required by the last preceding section."

Thus it appears that in this State the act of emancipation must be by writing, executed as above mentioned. The court then committed no error in excluding from the jury all evidence of the declarations of the intestate, of his intention to emancipate the plaintiff, and of the circumstances which prevented him from doing so by his will.

2. The second point is, that the plaintiff offered to prove his right to freedom by a residence in the State of Illinois, with the intestate's consent, and proposed to ask these questions of the witnesses: "What Pharis, the intestate, had been heard to say in his lifetime of the plaintiff being a free man, and what the witness had ever heard said in the presence of said Pharis, in his lifetime, of the plaintiff being entitled to freedom, from his being in Illinois with Pharis' consent."

Here, it may be observed, that it does not appear on the bill of exceptions that the plaintiff offered to prove that he had ever resided in Illinois by the consent of the intestate, whose slave he appears to have been. Two witnesses were interrogated; the first was requested to

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state what he had ever heard Pharis say in his lifetime about the plaintiff being a free man; the second was required to state what he had ever heard any one say in the presence of Pharis in his lifetime, about the plaintiff having been in the State of Illinois. What has been said on the first, is enough to show the absurdity of such a question as the first; if, for instance, he becomes free in Missouri, the act by which he becomes free, should have been shown to the court, to-wit, the deed of emancipation, if he had been emancipated by the intestate in his lifetime; or the will, if the emancipation was by will. Nothing can be more absurd than the question put to the second witness, viz: What he had heard said in the presence of the intestate in his lifetime about the plaintiff having been in the State of Illinois. The plaintiff might have gone into the State of Illinois without the consent of the intestate, as a runaway, or he might have accompanied the intestate on a journey through that State to Kentucky, or some other State. This court, in the case of *Rennick vs. Chloe*, said, that when a suitable foundation had been laid for such testimony, the admissions of a person holding another in slavery, that he or she is free, is undoubtedly, for many purposes, legitimate evidence, an opinion in which I entirely concur, and I then dissented from the court in the judgment rendered, only because I believe a suitable foundation had not been laid. In the case of *Winny vs. Whitesides*, 1 Mo. Rep. 334; *Milly vs. Smith*, 2 Mo. Rep. 32; and *Vincent vs. Duncan*, Ibid. 174, (top paging of new edition,) this court has, as the plaintiff's counsel states, decided, that if the owner of the slaves take them into Illinois, with intent to reside there, and do reside there, keeping the slaves, "they become free." What was wanting in the bill of exceptions, the plaintiff's counsel, with more ingenuity than candor, has supplied in the statement of the case in his brief, thus laying a foundation, which according to these decisions above cited, would have authorized the plaintiff to give in evidence either the direct or implied admissions of the intestate. But it does not appear from the bill of exceptions, that any pretence was made to prove a residence in Illinois by consent of the intestate or otherwise. The questions could not then be put, consistently with the spirit of the cases above cited.

The judgment of the circuit court is then affirmed.

Lisle vs. Rhea.

LISLE vs. RHEA.

1. A judgment in these words, viz: "It is therefore considered by the court, that the defendant recover of the said plaintiff his costs, and charges by him in this behalf, laid out and expended, and that he have thereof execution," is not a final judgment. A final judgment in favor of a defendant should be in this form: "It is therefore considered by the court, that the said plaintiff take nothing by his writ, and that the defendant go hence without day, and recover against the plaintiff his costs and charges by him, about his defence, &c."

APPEAL from the Grundy Circuit Court.

TOMPKINS, J. delivered the opinion of the court.

This was an action of trespass, commenced in the circuit court of Grundy county, by Elizabeth Lisle, against Sebert Rhea, on a charge of taking by force certain personal property of the plaintiff. The defendant pleaded the general issue, and the plaintiff joined issue. On the day of trial, neither party requiring a jury, the cause was submitted to the court sitting as a jury. The court after hearing the evidence adduced by both parties, found (as the record states,) for the defendant. This entry is then made: "It is therefore considered by the court, that the defendant recover of said plaintiff his costs, and charges by him in this behalf, laid out and expended, and that he have thereof execution." Judgment is here given the defendant for the costs of suit; but for any thing here adjudged, the plaintiff is yet in court by no means hindered from proceeding in the cause. The judgment should have been thus entered: "Therefore it is considered by the court, that the said plaintiff take nothing by her writ, &c.; and that the defendant go hence without day and recover against the said plaintiff his costs and charges, by him about his defence, &c." Field's Appendix, chap. 39, sect. 51, p. 242. There being no judgment entered up, it becomes useless to observe any further on the case. But it may be observed that there was no exception taken to any evidence given, no instructions were asked or given, and consequently there could be no exceptions taken to the instructions either given or refused. In such a case, even if a final judgment had been entered up, this court would hardly have disturbed the finding of the court sitting as a jury.

The cause is dismissed.

Jones vs. Hoppie.

JONES vs. HOPPIE.

1. A person specially appointed constable, under the 20th section, 2nd article of the act to establish justices' courts, and to regulate proceedings therein, R. Code, 1835, is to be regarded as a deputy of the proper constable, as to the lien of executions in the hands of the proper constable.
2. As to the form of a final judgment, see Lisle vs. Rhea.

ERROR to Lafayette Circuit Court.

TOMPKINS, J., delivered the opinion of the court.

This was an action of trespass, brought by Jones in the circuit court of Lafayette county, against Jacob D. Hoppie. The circuit court having decided against Jones, he appealed to this court.

On the trial of the cause, the following agreed case was made, viz: It was agreed that on the 4th day of February, in the year 1842, one George E. Taylor, and one Robert B. Bradford, procured a warrant to be issued by Eldridge Burden, a justice of the peace for Lexington township, in said county, against one John H. Wilson; and that on the same day, the said Wilson was brought before the justice of the peace, judgment given against him in favor of said plaintiffs, and execution issued and delivered to the constable on the said fourth day of February, 1842. This constable was Jones the plaintiff, in this action, who was made constable for this special purpose, at the risk and request of the above named plaintiffs, Taylor and Bradford, under the 20th section of the second article of the act to establish justices' courts and to regulate proceedings therein, p. 362, of the Digest of 1835.

The evidence on the part of the defendant Hoppie was, that on the 24th day of January, 1842, several judgments were obtained before another justice of the peace of the same township and county, by four several plaintiffs against the said John H. Wilson, and that on the 26th day of January aforesaid, executions were issued on said last mentioned judgments, and placed in the hands of Hoppie, the defendant, for collection; and it is further agreed that the said Hoppie was the regular constable of said Lexington township. It was further agreed, that said Jones, the plaintiff, on the fourth day of February, 1842, levied the execution, to him delivered, as aforesaid, on the property in the declaration demanded, and that on the said fourth day of February, 1842, after Jones had made his levy, Hoppie, the co.

Jones vs. Hoppie.

levied on the same property in the hands of Jones, and sold it under the executions to him delivered as aforesaid.

The question to be decided is, to whom did the property belong, whether to Jones, made constable for that special purpose, or to Hoppie, the regular constable?

The counsel for the plaintiff contends, that this is a case of diligence, in which one officer by his superior diligence has got the advantage of another, and that our statute on the subject of liens, does not mean to give such a lien, as to bar a junior execution in the hands of another and distinct officer, from being executed.

The act of the 13th February, 1839, to which he refers as the law on the subject of liens, is an act to amend an act to regulate executions, approved March 20th, 1825.

A justice of the peace is, as aforesaid, authorized by the 20th section of the 2d article of the act to establish justices' courts, &c., upon being satisfied that process issued by him will not be executed for want of an officer to be had in time to execute the same, to empower any suitable person not being a party to the suit, to execute the same, by an endorsement upon such process to the following effect: "At the risk and request of the plaintiff, I authorize ——— to execute and return this writ," page 352 of the Digest.

It could not be supposed, that the Legislature intended this special delegation of power to be made for the purpose of taking an undue advantage of the township constable. By the evidence agreed to be correct, it appears that these elder executions had been lying in the hands of the constable Hoppie, only nine days, when on the 4th day of February, Wilson the defendant in all the executions above mentioned, is brought before the justice on a warrant, and on the same day, judgment rendered against him, execution issued thereon, and immediately put into the hands of Jones, and levied on the property to which this claim is set up; and all this is done too, before Hoppie with the elder executions in his hands, could arrive on the spot. It does not seem that the case had occurred which the statute contemplates, of the want of an officer to execute the process in time, the regular constable being at hand, and contending with this specially delegated officer for the first possession of the property. We are disposed to regard this officer, specially appointed to serve a particular process, rather in the light of a deputy to the township constable, so much so, at all events, that he shall gain no advantage over the true constable, by taking a prior possession of property in the constable's township. Jones' possession, therefore, of the property levied on, is to be regarded as the possession

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Lindsay vs. Moore.

of Hoppie, and this last acted correctly in selling it, and appropriating the proceeds to the satisfaction of the elder executions. With these observations, that Hoppie according to the testimony agreed in this case, acted correctly, the cause will be dismissed, there being no final judgment entered against the plaintiff.

The entry is, "The cause is submitted by consent of parties to the court, and mature deliberation being thereupon had, this court doth find the issue for the defendant. It is therefore considered by the court, that the said defendant recover against the plaintiff, his costs, &c. and have thereof execution." It should have been thus: "It is therefore considered by the court, that said plaintiff take nothing by his writ, &c. and that the said defendant go hence without day, &c.; and it is further considered by the court, that the said defendant do recover against the said plaintiff his costs and charges, &c." See the case *Lisle vs. Rhea*, decided at this term.

This case is dismissed at the plaintiff's costs.

LINDSAY vs. MOORE.

1. M. gave L. a letter of credit, on which goods were obtained. Held, that M. paying the amount of the goods so sold, is entitled to recover of L., although the goods were charged to L. & D., and is presumed to have paid at the request of L. although no suit had been brought against him.

ERROR to Platte Circuit Court.

JONES, for the Plaintiff in error.

TOMPKINS, J. delivered the opinion of the court.

Benjamin D. Moore brought his action of assumpsit in the circuit court of Platte county, against James Lindsay, and obtained a judgment against him, to reverse which Lindsay brings the cause into this court by writ of error.

On the trial of the cause, Moore, the plaintiff below, and appellee here, gave in evidence an account for goods charged to be sold to Lindsay & Duncan, by Kenneth Mackenzie, a merchant of St. Louis; and to prove the account he read in evidence the deposition of one John

Lindsay vs. Moore.

Cochran, who stated that he knew both the plaintiff and defendant in the action; that he was a clerk in the house of Mackenzie when the merchandize in the annexed bill was sold, and that he continued as clerk in the said house till the month of October, 1843, and that he knows that the merchandize charged in the said bill, was purchased by the defendant in this case, and delivered to the defendant; and that the several credits as stated in the said account, are correct, and that the payments were made by the persons therein named, and that Benjamin D. Moore has settled the balance of said account, amounting to the sum of one hundred and sixty-four dollars and twenty-eight cents.

The deponent further stated that at the time of the purchase of the goods aforesaid, Lindsay, the defendant in this case, brought to the said Mackenzie a letter of guaranty annexed to said depositions, and upon the faith of the said guaranty, the said goods were sold to Lindsay & Duncan, the said Lindsay being the party defendant in the above entitled cause.

The letter of Moore to Mackenzie, above referred to, states some things complimentary to Lindsay, and recommending him as a good customer to Mackenzie; the writer, Moore, promises to be responsible to Mackenzie for three or four hundred dollars for Lindsay, provided he paid Mackenzie "down," (meaning in cash,) some hundred and fifty dollars, or thereabouts.

The defendant objected to the reading of the deposition, assigning for reason that there was no proof that the defendant had notice of the time and place of the taking, and because the testimony was irrelevant. The court overruled the objection, and the defendant excepted to the decision.

The defendant Lindsay, appellant here, gave in evidence that in 1839, about the time of the date of the letter of the plaintiff, Moore, above mentioned, the said Moore and one Linn were doing business in partnership, as partners, in Platte county, as merchants, and that Lindsay, the defendant, was about the same time doing business in the store of Moore & Linn, about three or four months; and that Duncan, a man in the employment of Moore & Linn, boarded with Lindsay, the defendant, about three or four months; that Linn, of the firm of Moore & Linn, also boarded with the defendant for some time, perhaps two or three months.

It was further in evidence, that the services of Lindsay, the defendant, as clerk of Moore & Linn, were worth \$25 per month; that the board of Linn, of the firm of Moore & Linn, was worth \$1 50 per week, and that Lindsay settled the business of the firm of Moore & Linn, and

Lindsay vs. Moore.

that his services in that capacity were worth \$17. Lindsay also offered in evidence a receipt of the plaintiff dated 29th September, 1839, for \$500, for the purpose of paying to Chouteau & Mackenzie \$200, and the balance to another house. This was excluded, and the exclusion excepted to. No other evidence was offered.

The plaintiff, Moore, prayed the following instructions :

1. If the jury believe from the evidence, that the plaintiff, Moore, paid \$164 25 for the use of the defendant, then they will find that amount in damages, for the plaintiff.

2. That the jury will disregard and exclude from their consideration, all the evidence that has been offered by the defendant in relation to his services for Moore & Linn, as also all the evidence in relation to boarding Thomas Duncan for Moore & Linn.

These instructions were objected to by the defendant, and the court overruling the objections, its decisions were excepted to by Lindsay, the defendant, appellant here.

The court then gave for the defendant the instructions following, to wit :

1. Unless the jury believe that the plaintiff paid Mackenzie the money before the commencement of this suit, they will find for the defendant.

2. Unless they believe that the plaintiff paid Mackenzie the money on the account, they will find for the defendant.

The court then gave the instruction following, viz :

1. If the jury believe from the evidence that the firm of Lindsay & Duncan bought the goods of Kenneth Mackenzie, then they they will find for the defendant.

2. That the court must be satisfied that the defendant bought the goods of Kenneth Mackenzie, on the faith of the letter of guaranty, and that he paid one hundred and fifty dollars, or thereabouts, at the time the goods were bought and delivered to him, or they must find for the defendant.

The defendant then moved to set aside the verdict, and for a new trial for the reasons following :

1. Because the verdict is contrary to evidence.
2. The court misinstructed the jury for the plaintiff.
3. The court committed error in refusing the defendant's instructions.
4. The court committed error in in admitting the plaintiff's evidence, and in excluding that of the defendant.

Lindsay vs. Moore.

The sum of the evidence given by the plaintiff is, that the appellant, Lindsay, defendant below, on the credit and responsibility of Moore, the plaintiff, obtained a credit for \$600, in goods. These goods are charged in the account to Lindsay & Duncan, at the request, in all probability, of Lindsay himself; for Lindsay, to get the credit of Moore's recommendation, brings and delivers Moore's letter, and received the goods from Mackenzie. If Lindsay chose, as is probable, to have those goods charged to himself and Duncan, Mackenzie, who consented so to charge them, would consequently be bound to sue Lindsay and Duncan; but Moore, who gave Lindsay his credit with Mackenzie, and who made himself liable to Mackenzie, could not, by Lindsay's act, be made to loose his remedy against Lindsay alone, and compelled to sue Lindsay and Duncan. But it is contended that this evidence is not revelant, and that the defendant did not have notice of the time and place of taking the depositions.

First, then, as to the notice. It is not stated in the bill of exceptions that the plaintiff, Moore, did not give the defendant the requisite notice. If that fact had been stated, the judge of the circuit court might have refused to sign the bill of exceptions. But the defendant, Lindsay, has objected to the reading of the deposition, because, as he says, there was no proof that he had received notice of the time and place of taking, &c. The circuit court might have had before its eye the proof, and we are bound to believe that all its acts are correctly done, until the contrary appears. If the defendant had made the statement that there was no such proof, then the judge, by signing the bill of exceptions, would have admitted the correctness of his statement.

The second objection to the admission of this evidence, is absolutely futile. For if on the credit of Moore, he, Lindsay, obtained the credit in September, 1839, and in 1843, Moore, who was responsible for him, paid the balance due, he must be presumed to pay it at the request of Lindsay, for in such case the guarantor ought not to be compelled to wait till he is disgraced by the suit of the creditor. Nothing, then, can be more relevant than this evidence.

But the defendant, appellant, contends that his evidence was erroneously excluded. He offered in evidence as an offset to Moore's separate demand against him, some joint demands of his own against Moore & Linn, and Linn, the partner of Moore. This evidence was inadmissible, for the statute gives the right of set-off in those cases only where the suitors are mutually indebted to each other, and the receipt which he offered in evidence was for money to be paid to Chou-

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teau & Mackenzie, when he, Moore, was suing for money by him paid to Mackenzie alone. This money, purporting to be received by Moore, to be paid to Chouteau and Mackenzie, he could by no means be permitted to pay to Mackenzie, and it ought not, therefore, to have been allowed to be given in evidence against money paid for him by Moore to Mackenzie. But indeed, if this money for which this receipt was given by Moore, was intended to be paid by Mackenzie in satisfaction for these goods, and the receipt was by mistake taken for money to be paid to Mackenzie and Chouteau, then it devolved on Lindsay to prove the mistake. But such proof might not have suited Lindsay's purpose; for it appears from the account sued on, that Mackenzie did, after the date of this receipt, give Lindsay a credit for money paid him by Moore to Lindsay's use, for two sums of money amounting to two hundred dollars. But if Lindsay did pay to Moore two hundred dollars for the use of Chouteau & Mackenzie, as this receipt seems to show, and Moore had not paid it over, then Lindsay must resort to his action against Moore for this breach of trust. It cannot be set off against another demand, and in no event can it be set off till it is proved that Moore has not paid it according to his undertaking. From the evidence given in the cause, we are left to conjecture that Lindsay wished to be credited twice for the same sum of two hundred dollars.

It does not appear from the record to be true, that the court refused to give the instructions asked by Lindsay, on the contrary, the court voluntarily instructed the jury for the defendant, and in these instructions evinced more sagacity, than Lindsay did in his own behalf.

The judgment is affirmed.

HARR vs. KNIGHTON.

1. A writ of error will only issue on a final judgment.

ERROR to Platte Circuit Court.

TOMPKINS, J. delivered the opinion of the court.

Henry M. Knighton brought suit against Orwell Horr, before a justice of the peace of Platte county, and obtained judgment for thirty-three dollars. Horr appealed to the circuit court.

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In the circuit court the cause was submitted to a jury, who returned the following verdict: "We the jury, find for the plaintiff the balance of the order, eighteen dollars, with six per cent. interest." No judgment appears to have been rendered by the circuit court. In such case, the writ of error does not go from this court to bring up the cause. It only lies where there is a final judgment. Section 1st of the act to regulate practice in the supreme court, p. 518 of the Digest of 1835. The cause must be dismissed.

COX vs. THE STATE.

1. An appeal from the judgment of a justice, under the act to regulate the proceedings of Justices' Courts, in cases of breach of the peace, R. C. 1835, must be perfected on the day of trial.
2. Such appeals are not governed by the act to regulate proceedings of Justices' Courts, in civil cases.

APPEAL from Platte Circuit Court.

TOMPKINS, J. delivered the opinion of the court.

The defendant, Cox, was on the seventh day of March, 1843, found guilty before a justice of the peace of Platte county, of a breach of the peace. On the same day, he prayed an appeal, and it was perfected on the day following, to wit: on the 8th day of March, 1843.

When the cause came into the circuit court on this appeal, the appeal was dismissed on the motion of the circuit attorney, and the judgment of the justice affirmed.

The act of 20th January, 1835, in the Digest of 1835, page 372, regulates the proceedings of justices' courts in cases of breach of the peace. The 15th section of that act provides that any person convicted under it, may appeal to the circuit court, if he shall on the day of the rendition of the judgment, file an affidavit stating that he verily believes himself aggrieved by the verdict and judgment, and also enter into a recognizance with sufficient securities, householders of the county, &c.

The 19th section of the same act declares that, "if the appeal shall

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not be taken and perfected on the day of rendering judgment by the justice, the judgment shall be affirmed." The excuses for not perfecting the appeal on the day of trial, will be passed over without any notice, save that if there had not been time enough to perfect the appeal on the day of the commencement of the trial, the trial might have been continued till the next day, as must necessarily be the case, where one day is not long enough to finish the trial.

For the appellant, it is contented, that by the 22d section of this act, he is entitled to all the privileges granted to appellants, by the act to regulate proceedings in justices' courts in civil cases, that is to say, that by the 3d section of the 8th article of that last act, he may appeal at any time within ten days, and that by the 12th section of the same act, "the appeal shall not be dismissed on account that there is no recognizance, or that the recognizance given is defective, if the appellant will before the motion to dismiss is determined, enter before the circuit court into such recognizance, &c."

The 22d section of the act under which the trial was had, and under which these above mentioned privileges are claimed, is in these words: "22d, In all cases not specially provided for by this act, (the act to regulate proceedings in justices' courts in cases of breach of the peace,) the process and proceedings before the justice, shall be governed by the laws regulating proceedings in justices' courts in civil cases."

This act seems to provide in the most special manner, for taking an appeal on trials for a breach of the peace. As above mentioned, the 15th section provides, "that the person convicted may appeal, if he shall, on the day of the rendition of the judgment, file an affidavit stating, &c., and also enter into a recognizance with sufficient securities, &c." The appeal being given on condition, that these things be done on the day of the rendition of the judgment, it might reasonably be supposed that the appeal ought not to be allowed, unless the terms were complied with. But if any room for doubt on that head were left, that doubt is settled by the 19th section, which declares that, "if the appeal be not taken and perfected on the day of rendering the judgment by the justice, the judgment shall be affirmed." Proceedings against persons for a breach of the peace, are necessarily more strict than in civil cases. It is easy to be perceived, that if persons convicted of such offences were permitted to appeal, and prosecute such appeal as in civil cases, many inconveniences would ensue; and many of the provisions of this act would be futile. The appellants, in most cases, having given no recognizance, would abscond.

The judgment of the circuit court is affirmed.

Lewis vs. Lewis.

LEWIS vs. LEWIS.

1. The act of Congress, which authorizes the Register and Receiver to decide upon preemption rights, makes their decision final, until reversed by the Commissioner of the General Land Office, or the President.
2. A State court will not interfere to set aside their decision, unless it be affected with fraud, or coupled with a trust. It has no right to interfere with, or to control the officers of the General Government in the disposal of the public lands.
3. *Qu*: Will a court, in any case, interfere until, a patent issues, the patent of the United States not being compelled to issue a patent to the holder of a certificate, but empowered to issue to the rightful claimant?
4. But where a party claiming a right under the act of the Federal officers, calls upon the State courts to aid him in depriving another of a right conferred by the laws of the U. S., although no title have passed, they will interfere, and determine the rights of the parties: As where A, claiming under a certificate, brings ejectment against B, who is entitled to a pre-emption to the land, B will be protected in his right.
5. The judicial acts of Executive and Ministerial officers, are not considered as judgments, from which there is no relief, but by appeal, writ of error, or of false judgment. They are only acts which may be performed by deputy.
6. A general charge of a fraudulent combination, &c., usually inserted in a bill, is not sufficient to charge fraud; there must be a specific allegation of fraud.

ERROR to Platte Circuit Court.

JONES, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. That the facts stated in the bill and admitted by the demurrer, show the complainant entitled to a pre-emption right to the land in dispute, by the virtue of the act of Congress of the 1st June, 1840, and the acts to which it is amendatory. (See Acts.)

2. That Jesse and James Lewis, being joint pre-emptors on n. w. qr. s. 18, t. 52, r. 34, were confined to the same, and had no right to any other lands by virtue of the act 22d June, 1838. (See the act.)

3. That the pre-emption right of complainant to the land in dispute, is superior in dignity to that of defendant, and must prevail over that of defendant, if free from objection. (Rev. Stat. Mo. 234, sec. 2; 3 Condensed Reports of the Sup. Court U. S. 238; 5 Mo. Rep. 346.)

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4. That the decision of the Register and Receiver, in regard to pre-emption rights, is conclusive only against the United States, and others are left to the courts for their remedy. 1 Mo. Rep. 398, Bird, *et al*, vs. Ward & Cravens.

5. That this court can look beyond the certificate and patent of defendant, and examine the progressive stages of title from its incipient state until its consummation, and decree title in complainant if he has the superior equity. 7 Mo. Rep. 621; 1 Peters' Rep. 664; 3 Condensed Rep. S. C., U. S. 333.

6. That the defendant having no right of pre-emption to the land in dispute, the Register and Receiver acted beyond the pale of their authority in giving him a certificate to the land in question; the certificate therefore is void. 5 Mo. Rep. 346; 1 Peters' Rep. 340; 10 Peters' Rep. 478; 6 Peters' 720; 15 Peters' Rep. 105-'6; 13 Peters' Rep. 510; 9 Cranch Rep. 98.

7. That the pre-emption law is a quasi contract. 2 Kent Com. 271-'2.

8. That the defendant is guilty of actual fraud in obtaining the certificate to the land in question, he having actual notice of the right of complainant. 5 Randolph Rep. 453; 6 Peters' Rep. 716.

9. That defendant having obtained the certificate to the land in question, by fraud and imposition, this court will relieve complainant against it. 1 Johns. Chy. Rep. 405; 7 Johns. Chy. Rep. 182.

KITRLEY, for Defendant in Error.

I rely in this court upon the following propositions to sustain the decisions of the Circuit Court:

1st. The acts of Congress conferred power on the Register and Receiver of the Platte Land Office, to decide upon complainant and defendant's claim to the rights of pre-emption to the land in controversy, and that their decision in that controversy was a judicial and not ministerial act, and is conclusive between the parties in this case. See 1 Peters' United States Rep. 340, the case of Elliott, *et al*, vs. Piersol, *et al*, 13 Peters' Rep. 511. Wilcox vs. Jackson; 1 Peters' Rep. 668-'9, Ross vs. Barland.

2d. The circuit court can have no jurisdiction in this cause, under the allegations and facts set out in the bill. If it be claimed on the ground of the alleged fraud, then I insist the allegations of the bill are wholly insufficient for such a purpose, there being no sufficient specification of such fraud, in time, place or circumstance, the same being

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left to the general formal allegation, as in all bills, not traversible from its generality.

3. This bill seeking to revise and annul the decision of the Register and Receiver, makes no portion of the proceedings before those officers, parts of the bill, and offers no excuse for not doing so, and in that respect is defective and demurrable.

SCOTT, J., delivered the opinion of the court.

This was a bill in equity, filed by complainant below, who is plaintiff in error, against the defendant, praying that the defendant may be decreed to convey to complainant a half quarter section of land, for which he had improperly, and against law, obtained a certificate of the right of pre-emption from the Register and Receiver of the U. States Land Office, in the north-western land district.

There was a controversy between complainant and defendant relative to a right of pre-emption to a half qr. section of land, under the acts of Congress of June 22, 1838, and June 1, 1840. The Register and Receiver determined that the right was in the defendant, and upon an appeal to the Commissioner of the General Land Office, that decision was confirmed, and the defendant was permitted to enter the tract of land. The complainant thereupon filed this bill for relief, against the decision of the Register and Receiver, as being erroneous, and contrary to the laws of the U. States. It does not appear that any patent for the land has been issued. The bill was demurred to for want of equity, and the demurrer was sustained, and the bill dismissed; to reverse which decree this writ of error has been sued out.

The respective claims of the parties to the land in controversy, are not stated at more length, because it is not deemed necessary to a correct understanding of the opinion in the cause.

In the case of Stephenson vs. Smith, 7 Mo. Rep. this court held, that if an individual obtains a patent for land from the U. States, and is affected with any fraud, or trust, in relation to it, a court of equity will regard him as a trustee, for those who may have been injured by the fraud practiced, or are entitled to the benefit of the trust. This doctrine, it was supposed, did not violate any engagements contracted with the General Government by this State; nor was it imagined that the State courts in entertaining such a jurisdiction, acted in hostility to the laws of the U. States, but merely performed that which the courts of the U. States would have done had they been entrusted with original

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jurisdiction in such cases. The object of the exercise of such jurisdiction, was not to set up any State laws or regulations in opposition to, or in hostility with the laws of Congress for the disposal of the public lands, but to give a full and complete execution to those laws, by awarding titles to those entitled to them by the laws administered according to the principles of equity and good conscience, which pervade the code of every civilized people. It was considered like the case of two citizens contracting abroad in reference to the laws of a foreign country, and a dispute should afterwards arise here between them respecting their rights, our courts would determine the controversy according to the foreign law.

Our courts utterly disclaim any right to interfere with, or to control the officers of the General Government in the disposal of the public domain. Such a power has not been conferred by Congress on the courts of the U. States; and it would hardly have been given to the State courts. Nor could such a power, on general principles, considering the nature of our government, be considered inherent in the State courts. *McLuny vs. Silliman*, 2 Wheat. 369; *McIntire vs. Wood*, 7 Cranch 504. Two persons in good faith, claim a right of pre-emption to the same tract of land. The United States, the owner, declares that he who shall establish his right, to the satisfaction of the Register and Receiver, shall be entitled to the land. These officers determine that one party, in preference to the other, is entitled to the right of pre-emption, and the land is given to him accordingly. On what principle can a court of law or equity interfere with this determination, and grant the land to the disappointed claimant? If the courts could do this, then the right of pre-emption would be determined, not according to the judgment of the Register and Receiver, but in conformity to that of the courts, which would be a manifest violation of the will of the owner of the land.

But if our courts had such a power, would they interfere before the emanation of a patent. The President of the U. States being charged with the duty of seeing that the laws are faithfully executed, withholds or issues a patent, as he is advised the law requires. He is not bound as a matter of course to issue a patent, whenever he is required so to do, by the holder of the Receiver's receipt; but he will look behind it, and see that the holder of the certificate is really entitled to the land, for which a patent is demanded. If the State courts should interfere before a patent is issued, in what a situation would they be placed? Should this court determine to-day that the complainant was en-

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titled to the pre-emption, might not the President to-morrow, give the patent to the defendant? A court would but ill consult its own dignity, in permitting itself to be placed in a situation, where its judgments and decrees might be set at naught with impunity. A court should never command, or direct, but where it can enforce obedience to its orders and decrees. If it be said the court can afterwards, in another proceeding, compel a conveyance of the legal title, such an answer admits that the present suit is premature and unnecessary.

In illustration of the position, that a court has no jurisdiction in cases like this, unaffected with fraud or a trust, although a patent may have issued, we will refer to two cases decided in the English courts of chancery, somewhat analagous to the one now under consideration, the principle of which is, that if a party claims, before the commissioners appointed under the conventions, for indemnifying British subjects for the confiscation of their property by the French Revolutionary Government, in a character which he really sustains, and an award is made to him in that character; a court of chancery has no jurisdiction to interfere at the suit of a party claiming to have a better title to the compensation. *Hill vs. Reardon*, 3 Condensed Eng. Ch. Rep. 253; *Loyd vs. Lord Frimlestown*, 6 Con. Eng. Ch. Rep. 134.

In disclaiming for our courts a right to interfere with the sale of the public lands by the general government, in cases where the title has passed without fraud, and unaffected with any trust, we do not wish to be understood as conveying the idea, that they will not interfere in cases where the title has not passed, and in which a party claiming under an act of the federal officers, calls upon our courts to assist him in depriving another of rights enjoyed by him under the laws of the U. States. In these cases our courts will examine his claim to their aid, and will grant, or withhold it, as in their opinion, he may, or may not, be entitled to it. Such cases might have arisen under the late pre-emption laws, and may yet arise, in cases wherein the time for proving up their pre-emptions may not have elapsed. Our statute enables a party to maintain an ejectment on a pre-emption right, and if he can maintain an ejectment on such right, so he can defend one against any person not showing a better title. If the land officers under the late pre-emption laws, had permitted an entry of land on which there was a right of pre-emption, and an ejectment had been brought on the entry against the pre-emptor, he might have proved his right to a pre-emption under the laws, and defeated the action. So if a certificate of the right of pre-emption had been granted to one, before the expiration of the time, within which those entitled to pre-emptions were required to prove them up, and he

had brought his action against the person in possession, entitled to the pre-emption, he must have failed in his action. In such cases, so far from violating any act of Congress, our courts are only carrying those laws into effect, and bestowing the bounty of the government on those for whom it was intended. The cases of *Isaacs vs. Steel*, 3 Scam. Rep. 103 and *Bruner, et al, vs. Manlove, et al*, Ibid 342, decided by the supreme court of Illinois, fully sustain the foregoing doctrine.

Registers and Receivers are executive and ministerial officers. They sometimes act judicially, as in determining the right of pre-emption, just as we say some of the acts of a sheriff are ministerial, and some judicial. But when we say a sheriff acts judicially, we do not mean that he is a court, and his acts are judgments against which there is no redress or relief, but by appeal, writ of error, or of false judgment. When it is said that an act pertaining to a ministerial office is judicial in its nature, the meaning is, that it cannot be performed by deputy, and that is the use of the distinction between ministerial and judicial acts in executive offices. It is inconceivable on what principle it can be said, that the Register and Receiver are judicial officers in that sense; that their acts, like the judgments and decrees of a court, are binding and conclusive on all the world, until reversed or annulled, according to the principles and usages of law. The Constitution of the U. States, ordains that the judicial power shall be vested in one supreme court, and in such inferior courts, as the Congress may, from time to time, ordain and establish, and that the judges, both of the supreme and inferior courts, shall hold their offices during good behavior. Do the Register and Receiver hold their offices during good behavior? If not, then they are not inferior courts within the meaning of the constitution; and no judicial power, according to the legal meaning of those terms, can be constitutionally vested in them.

There is nothing inconsistent in all this, with what has been before said in relation to the impropriety of our courts interfering in cases, where a patent has been granted to a pre-emptor by the President of the U. States, in pursuance of a decision of the Register and Receiver. Their refusal to give relief in such cases, does not proceed from the consideration, that the act of these officers is a judgment from which there is no appeal, and which is binding and conclusive on the whole world. Far from it. The United States is the owner of the public lands, and can dispose of it on such terms, and in such manner, as seem fit. It is declared by law, that he shall have a title, who can show himself entitled to it, to the satisfaction of the Register and Receiver. In a case free from all fraud and collusion, these officers declare that a particular

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individual, to their satisfaction, has proved himself entitled to a tract of land, and it is given to him accordingly. Now do the courts refuse to look into this matter, because the decision of the Register and Receiver is a judgment which is binding, until reversed or set aside, or because it is the will of the owner of the land, that it shall be conveyed as those officers determine, whose action is final? A father has two sons at school, and he declares that a tract of land shall be given to that one of them, who shall have best demeaned himself, in the judgment of the preceptor. The preceptor, without fraud or collusion reports in favor of one of them; the land is given accordingly. Can a court interfere and examine the correctness of the judgment of the preceptor, with a view to give the land to the other son? Surely not. But this is not because the report of the preceptor is a judgment, in a judicial sense, binding until it is set aside; but because the owner of the land has prescribed the terms on which it shall be conveyed; the condition is, that it shall be on the judgment of the preceptor, which is final. And for a court to interfere to correct that determination, would be to give the land, according to the opinion of the court, and not of the preceptor, which would be a manifest violation of the will of the owner.

This case has been treated as one unaffected with fraud, because there is no charge of fraud, but that contained in the general charge of a fraudulent combination, usually inserted near the close of a bill, and although it was formerly held otherwise, yet it is now the practice, when a demurrer is entered to the bill, not to put in answer to the general charge of a fraudulent combination. *Mitford* 70, 240; *Brooks vs. Lord Whetworth*, 1 *Mad. Rep.* 57; *Oliver vs. Haywood*, 1 *Anstr.* 82.

Decree affirmed.

TOMPKINS, J.

The appellant, Edmund Lewis, filed a bill of complaint in the circuit court of Platte county, against Jesse Lewis, in which he complains that he was entitled to the right of pre-emption in the purchase of a certain quarter section of land lying in said county; that the Register and Receiver of the land district in which it lies, had adjudged the said land to the defendant, Jesse Lewis, and prays that the said Jesse Lewis be decreed to transfer the said land to the complainant, on his payment of the price, &c, to him, by the complainant. The circuit court decreed the complainant's bill to be dismissed, and that complainant pay costs.

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The complainant claims under the act of 1st of June, in the year 1840, which is entitled "an act supplemental to an act entitled an act to grant pre-emption rights to settlers on public lands," approved 32d June, 1838. And this last act itself revives the act of the 29th of May, 1830, the third section of which provides, "that prior to any entries being made under the privileges given by this act, proof of settlement or improvement shall be made to the satisfaction of the Register and Receiver of the land district in which such lands may lie, agreeably to the rules to be prescribed by the Commissioner of the General Land Office for that purpose."

In the case of *Ross vs. Doe*, on demise of *Burland* and others, the Supreme Court of the U. S. decided, that where an act of Congress gave commissioners power to hear and decide all matters respecting settlement rights, and to determine thereon according to justice and equity, and declares their determination to be final, we are bound to presume that every fact necessary to warrant the certificate in the terms of it, was proved to the commissioners. In *Wilcox vs. Jackson*, 13 Peters, p. 517, it was decided that the Register and Receiver, in deciding on pre-emption rights, are special judicial officers, and that their decision, when they do not exceed their jurisdiction, and act without fraud, is final and conclusive on the United States courts even, and that after the title passes from the United States, the State courts have no right to call in question a title acquired from the United States.

In *Matthews vs. Zane*, 4 Cranch, 382, and 7 Wheaton, 202, in the same case the Supreme Court of the United States decide (Ch. J. Marshall delivering the opinion of the court,) "that they will protect the purchaser from the United States." It might naturally be supposed that the lands belonging to the United States, no other power would assume to dispose of them. Indeed, in anticipation of any attempt to intermeddle in the sales of the United States land, the 10th article of the State Constitution, in the first section thereof, expressly provides, that "the General Assembly of this State shall never interfere with the primary disposal of the soil of the United States, nor with any regulation Congress may find necessary, for securing the title in such soil to the *bona fide* purchasers." But though Congress have made a regulation for the securing the title in the soil to those who claim a right of pre-emption, they have said that proof of settlement and improvement, satisfactory to their own officers, the Register and Receiver, shall be made by the claimant. Edmund Lewis, the complainant here, fails to make proof satisfactory to those officers, and comes into the State courts, praying them to decree the title out of Jesse Lewis, to whom

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the officers of the United States had adjudged the right of pre-emption to himself. Now if the General Assembly of this State shall never interfere with the primary disposal of the soil of the United States, nor interfere with any regulation Congress may find necessary for securing the title in such soil to the *claimant* by right of pre-emption, whom the Register and Receiver, officers appointed for that purpose, have decided to be the *bona fide* purchasers, whence will this court derive its jurisdiction over those lands? Shall it be said that this court has any authority or jurisdiction which is not derived from the constitution of the State, and from the laws made in pursuance thereof? If any law of this State were to confer on its courts the power to take from the purchasers from the United States those lands which they hold under the decisions of the officers of the United States, such law, or rather such act, would be unconstitutional and void. But the legislature have passed no such act. And the courts of Missouri have no more right to exercise a superintending control over the Register and Receiver of the United States, than the United States courts have to exercise such superintending control over the Registers and Receivers of the State of Missouri. Each will be better employed by attending to their own business. If the Register and Receiver of the United States have injured Edmund Lewis, let him lay his complaint before the courts of the U. S., to whom alone those officers can in any event be amenable, and who alone can annul or control their acts.

The circuit court, in my opinion, committed no error in dismissing the bill, and its judgment ought to be affirmed.

CARR vs. THE CITY OF ST. LOUIS.

1. The by-laws of a corporation must not be repugnant to its charter.
2. The charter of the city of St. Louis establishes the office of Recorder, and fixes his fees, and the corporation can pass no by-law reducing his fees, or depriving him of them in any case in which, by the charter, he would be entitled to receive them.
3. A provision in the charter, by which the corporation is empowered to fix the compensation of its officers, does not necessarily carry with it the power to take away fees allowed by the charter.

ERROR to St. Louis Court of Common Pleas.

SCOTT, J., delivered the opinion of the court.

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This was an action of assumpsit brought by Carr, against the city of St. Louis, for fees due him as Recorder of the said city. The fees accrued in suits brought by the city of St. Louis against sundry defendants, in which suits the city of St. Louis recovered judgments against the defendants, which proved unavailing, in consequence of their insolvency and from other causes.

The fees claimed are those which are due for services rendered at the instance of the city in the prosecutions of the said suits.

There was an ordinance of the city in force at the time these services were rendered, which declared that in cases like those in which the fees are claimed, the city should not be liable for any costs.

An act amending the charter of the city of St. Louis, and creating the office of Recorder, in force during the time the services were performed, declares that there shall be a Recorder, who shall have jurisdiction throughout the corporate limits of the city, and shall be a conservator of the peace, and shall have all the powers and jurisdiction now vested in justices of the peace, and who shall receive the same fees for the like services. Acts 1841, page 136, sec. 22.

A previous portion of said act gives to the city council authority to fix the compensation of all city officers. Acts 1841, page 133, sec. 1.

The question is, whether under the foregoing statement of facts, Carr, the Recorder, is entitled to recover for the services for which the suit is brought?

It is a well settled principle of law, that the by-laws of a corporation must not be repugnant to its charter; the charter creates an artificial being, defines its powers, designates the purposes of its institution, and points out its mode of action. It is the fundamental law of the corporation, and is as a constitution to the body acting under and by it. Hence all by-laws in contravention of it are void. Was the act of the city council, denying fees to the Recorder in particular cases, inconsistent with its charter? The act creating the office of Recorder gave him the powers and jurisdiction of a justice of the peace, and the same fees for like services. It appears from the agreed case that the services were rendered for the city in suits brought by her. It will not be pretended that if similar services had been rendered for an individual, he would not have been compelled to pay fees therefor. The party to a suit at whose instance a service is rendered for which a fee is allowed, is liable to the officer for the fee, and the fact of his being permitted, in the event of a judgment in his favor, to recover back the fees expended, does not affect his liability; he is liable to the officer for them, although they may never be recovered, and although the practice is to wait for

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payment until they are recovered on execution, if the unsuccessful party is not insolvent.

The services for which justices may claim fees are enumerated by statute, and although it does not prescribe that corporations shall be liable therefor, yet when a statute speaks of "persons," "individuals," or "parties," corporations are included. The people vs. the Utica Insurance Company, 15 J. R. 358. Indeed the principle of the common law has been engrafted on our code, which declares that when any subject matter, party or person, is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included. Rev. Code, 383, sec. 26. If then the liability of a corporation is the same as that of an individual, it can no more than an individual throw off or relieve itself from the obligation to pay fees for services rendered.

It was competent for the legislature to enable the corporation to do this, and such a power might have been vested in the city authorities; and it may be said that it was done in that provision which empowered the city council to fix the compensation of all city officers. We do not think that the power to fix the salaries of the officers would necessarily carry with it a right to take away, or affect fees allowed by the charter to an officer created by it. We cannot perceive the wisdom of the legislature, which in enacting the fundamental law of a corporation, would insert a provision which the corporation itself might at any moment render nugatory. For if the city council had the power to take away the fees under one combination of circumstances, it might under and, and thus, in effect, repeal its own charter.

Judgment reversed and cause remanded.

STEAMBOAT MISSOURI vs. WEBB.

1. A bill of lading partakes of the nature of a receipt, and of a contract. So much as partakes of the nature of a receipt, may be explained or contradicted by parol testimony

APPEAL from St. Louis Court of Common Pleas.

CROCKETT & BRIGGS, for Appellant.

Steamboat Missouri vs. Webb.

POINTS AND AUTHORITIES.

1. On behalf of the appellant, we insist that the court erred in striking out the proof that the goods were delivered in as good condition as when received, and in refusing an opportunity to prove that the goods were not in good condition when received at New Orleans, and that they were delivered to Webb in the same condition as when received.

The course of the court was the result of considering the words "shipped in good order" in the bill of lading as an estoppel of the boat from going into the question of the condition of the goods, *in point of fact when received*.

That such language is not conclusive, we refer to the following authorities:

"A bill of lading is *prima facie* evidence of the highest order, *but not conclusive*. If the property was in packages open to inspection, and no fraud or imposition practiced, it might not be unreasonable to refuse evidence to prove that they were not in good order, when delivered." "But the property (velvets *in packages*, as here) was not open to inspection—the exterior only, visible." Barrett et al, vs. Rogers, 7 Mass. R. 297. See also Starkie on Evidence, 2d vol. (bill of lading); Hastings vs. Pepper, 11 Pickering, p. 43; 1 Greenleaf's Ev. p. 354: Brayman vs. Linden, 1 Bailey (S. C. Rep.) 174; Smith vs. Brown, 3 Hawk's (N. C. Rep.) 580; May vs. Baldwin, 4 Ohio R. 334; See language of the court in Camden vs. Steamboat Georgia, Mo. R.

COLT AND MINOR, for the Appellee.

POINTS AND AUTHORITIES.

1. The admissions of the bill of lading are conclusive as to the condition of the goods when shipped, and cannot be contradicted by verbal testimony. 1 M. Rep. p. 3, Barton vs. Wilkins.

2. Upon the evidence before the jury, they were correctly instructed.

3. No exception was taken and noted or allowed at the trial, to the rejection of the defendant's evidence, nor to the giving or refusing instructions by the court, nor was any bill of exceptions filed on the trial, which was on or before the 25th of June, but only after the motion was overruled, when at the close of the bill of exceptions then filed on the 10th of July, exceptions were put in generally to the whole proceedings complained of.

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Scott, J. delivered the opinion of the court.

This was a suit commenced in a justices' court against the steamboat Missouri, for damages to freight shipped by order of the plaintiff Webb, on board said boat, from New Orleans to St. Louis. The plaintiff obtained a judgment in the justices' court, and on an appeal to the circuit court a trial *de novo* was had, wherein judgment was again rendered for the plaintiff, from which the Steamboat has appealed to this court.

On the trial of the action, it appeared that the plaintiff shipped on board the Steamboat twenty packages of goods, consisting of cotton goods, (blue jeans,) put up in boxes in the usual way. That upon being opened at St. Louis, they were discovered to be damaged, and discolored as if by water. It was the opinion of a witness who examined the goods, that they were not injured by salt water. The bill of lading was in the usual form, and stated that the goods were shipped in good order.

The Steamboat then offered evidence to show that the goods were not in good condition when the bill of lading was executed; and were delivered in the same condition as when received by the boat. The court refused to let this evidence go to the jury, and the propriety of its exclusion is the point involved in this cause.

The cases cited from the Missouri Reports by the appellee, showing that parol evidence cannot be received to contradict or vary written contracts, maintained an undeniable principle of law, but they are thought not to be entirely relevant to the subject in controversy. A bill of lading, it seems, possesses a two-fold character, partaking both of the nature of a receipt and a contract. A receipt is an acknowledgment of payment or delivery, and may contain a contract to perform something in relation to the thing delivered. Nothing is better settled in law, than that a receipt is open to explanation by parol evidence. Then that part of a bill of lading partaking of the nature of a receipt, containing the recital that the goods were shipped in good order, may be explained and contradicted, but in other respects is to be treated like other written contracts. Greenleaf, 354; Cowen, 1439.

The case of Barrett vs. Rogers, 7 Mass. Rep., 297, is one extremely like that now under consideration. The question in that case was, whether velvets in cases represented to be shipped in good order, might be shown to have been damaged at the time they were received on board. It was remarked in that case, that a bill of lading was an instrument entitled to great regard, and imposing a proportional obliga-

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tion upon those who are bound for the execution of the responsibility which it assumes, there can be no doubt; but this responsibility must have reasonable limits, which must be determined by the nature of the subject matter. If the property to be transported, and which was declared to be in *good order*, was in all parts open to inspection, and no fraud or imposition was practiced, it might not be unreasonable to say, that no evidence should be admitted to prove that it was not in good order. That a bill of lading is *prima facie* evidence, and of the highest nature, there can be no doubt; but in this case the property was velvets in cases, which were not open to inspection, and could not be rendered visible without opening the cases and unfolding the goods, which, it is believed, is never done. The *exterior* only was visible, and neither the interior, its quality or condition, could be known to the master, who signed the bill of lading, but from the representation of the shipper.

In the case before us, the goods were put up in boxes, they were not open to inspection, and consequently it falls entirely within the reason of the above case.

Judgment reversed.

SHREVER, ET AL, vs. LIVINGSTON COUNTY.

1. A writ of error or appeal, will not lie on a refusal of a circuit court to issue a mandamus to the county court.

APPEAL from Livingston Circuit Court.

Scott, J., delivered the opinion of the Court.

Shrever, *et al*, were commissioners appointed to survey and mark out a State road from Brunswick, in Chariton county, to Chillicothe, in Livingston county, and to Trenton, in Grundy county. Sess. Acts 1843, page 351-2. After performing the services required of them by law, they applied to the county court of Livingston county, to audit and allow her portion of the expense of the survey. The county court refused to audit and allow the account of the commissioners, and they applied to the circuit court for a mandamus to the county court of Livingston county, by motion founded on a petition, which was over-

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ruled. From the order overruling the motion, the commissioners appealed to this court.

This is not a case for an appeal, or writ of error. The People, on the relation of Dikeman & Martin, vs. The President and Trustees of Brooklyn, 13 Wendall, 130. In cases of this kind, when an application is made for a mandamus, a writ should go, although the court may think the party not entitled to the relief he seeks; and when an answer is made, and a demurrer is put into it, the propriety of the proceeding is determined by the court below, and its judgment thereon may be reversed in this court. There is no final judgment here within the meaning of the statute, allowing appeals and writs of error.

Appeal dismissed.

FRANCISCUS vs. MARTIN.

1. A court has power to take cognizance of a motion for a rule against a party to show cause why a judgment of the court obtained by him, should not be set aside.

APPEAL from St. Louis Court of Common Pleas.

SCOTT, J., delivered the opinion of the court.

This was a proceeding, on a motion and rule, made on the appellee, Martin, to show cause why a judgment obtained by him in the St. Louis court of common pleas, and the proceedings thereon, should not be set aside, for reasons filed. The order of the court disposing of this proceeding, is in these words: "And forasmuch as the court cannot take cognizance of the rule herein, it is ordered that the said rule be discharged, and the motion therefor be dismissed out of court." We are rather inclined to the opinion, this is a proper case for a mandamus, but as the appellee is not disposed to press this objection, and is anxious to expedite the cause, the judgment will be reversed. It may be remarked that the authority and duty of a court to entertain motions of the character of that involved in this cause, are unquestionable. Courts should not refuse to hear such motions, because they may be of opinion they ought not to be granted. They should hear them on the merits, and enter a judgment or order on them, that the party may have a writ of error, or appeal, and not be compelled to resort to the tedious and slow process of a mandamus, which is necessary, in cases where a

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court refuses to act. *Astor vs. Chambers*, 1 Mo. Rep. 135, *Miller & Irvine vs. Richardson*, Ibid 221. Until a point is decided by the court below, this court has no authority to determine it. It was not decided by the court of common pleas, whether if the facts stated were true, it was proper to set aside the judgment and proceedings thereon. As this is a new question and of some importance, and it has not been argued, and as the authorities on the subject are not at hand, we will not undertake now to determine it.

Judgment reversed.

FRANCISCUS vs. THE BANK OF MISSOURI.

APPEAL from St. Louis Court of Common Pleas.

Scott, J., delivered the opinion of the court.

This case is like the case of *Franciscus vs. Martin*, determined at the July term of this court, 1844, and the same disposition is made of it.

COONS vs. GREEN, ADMINISTRATOR OF JONES.

1. Judgment rendered against A, and confessed by B, in a justice's court, on a bond purporting to be executed by A and B. On an appeal to the circuit court by A, in which B did not join, held, that B, was a competent witness to prove that A did not execute the bond.

APPEAL from St. Charles Circuit Court.

CAMPBELL, for Plaintiff in error.

COULTER, for Defendant in error.

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SCOTT, J. delivered the opinion of the court.

This was an action of debt, on a bond brought against Felix Coons and James Stewart. A judgment was rendered against Coons in the justice's court; and Stewart confessed judgment. Coons appealed to the circuit court, and on a trial *de novo*, made the defence that he did not execute the bond. The other obligor, Stewart, who had confessed judgment in the justices' court, and who had not joined in the appeal was called as a witness against Coons, who proved that Coons executed the bond sued on. Judgment was again given against Coons.

The question presented for our determination is, whether Stewart was a competent witness for the plaintiff, against Coons, his co-obligor in the bond?

The presumption of law is, that every person is a qualified witness; and if a court is divided in opinion, as to the competency of evidence, it is always received. Cowan's Phillips. In the case of Dixon vs. Hood, 7 Mo. Rep. 414, this court held that an individual sued, could not be allowed to prove that a co-suitor was a partner, and thereby obtain contribution. The same doctrine was asserted in the case of Levy vs. Hawley, 8 Mo. Rep. 510. The principle of these cases is obvious; a party liable for a demand will not be allowed to show by his own evidence that others are jointly liable with him, and thereby throw a share of the burden on them, which otherwise would be wholly borne by himself. So the court has held that the principal obligor in a bond, is not a competent witness for the surety, without a release of his liability for costs, and also of the penalty the law gives the surety, who pays the debt of his principal. Shelton vs. Ford, et al, 7 Mo. Rep. 209; Garrett vs. Ferguson's Adm'r. decided at this term. It seems to have been the settled law of this state for many years, that parol evidence may be received, to show who is principal, and who is surety in a bond, although on the face of the instrument they are all alike bound as principals. In the case of Foster vs. Wallace, 2 Mo. Rep. 194, such evidence was received without a question as to its admissibility. See the case last cited of Garrett vs. Ferguson's Admr.— If Stewart had no interest in establishing the fact, that Coons was surety, then he was competent for that purpose. In support of this principle, see 3 Stark., Title, Surety, 1886. We have seen that a principal is not a competent witness for his surety, without a release. It would seem, then, that the principal is testifying against his interest, when called as witness against his surety; and he surely is, for if the

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surety is condemned to pay the debt, beside the costs, the principal is also bound for the penalty given the surety, who pays the debt of his principal. The distinction between this case and that of Dixon vs. Hood, is obvious. That was a case between partners, and so was the case of Levy vs. Hawley.

As to the objection, that the witnesses being a party to the suit, is therefore incompetent, that cannot be maintained under the circumstances of this case. The general rule is, that a party to the record cannot be examined as a witness, and a plaintiff is never allowed to call a co-defendant as a witness. But this rule is subject to the qualification, that if a defendant has let a judgment by default, go against him, he may be examined by the plaintiff; Starkie, Title, Party, and Buller's *Nisi Prius*, 285. This seems well established in England, in all actions for torts, but in actions *ex contractu*, it does not prevail, because it is said a defendant would thereby make others contribute to the payment of a debt, for which he alone would be otherwise liable. But we have before seen, that this is not a case in which there can be a contribution; the reason for the conclusion does not therefore exist. Nor does the objection to calling a defendant who has let the judgment go by default against him, in actions *ex contractu*, which prevails in England exist under our laws. The rule in England, is founded on the principle, that when several are jointly liable for a debt, and sued for the same, the plaintiff must prevail against all, or none; and although a party may have let judgment go against him by default, yet if the plaintiff fails, as to another, judgment will be given against him, as to all. Our statute allows a plaintiff to take judgment against as many as he can show liable, and has thereby subverted the distinction in this respect, between actions *ex contractu* and *ex delicto*; and if a witness is otherwise competent, who has let judgment go by default against him, he may be indiscriminately examined in either form of action. See Campbell & Mason vs. Hood, 6 Mo. Rep. 211. Stewart having confessed judgment in the action, and being no party to the appeal, was certainly in as favorable a point of view, as regards the objection of being a party, as one who has let judgment go by default.

As to the objection, that Stewart was *prima facie* incompetent, when it was shown he had executed the bond, and that he was an incompetent witness to establish his own competency; if there is any weight in it, it may be answered by remarking, that it appears by the bill of exceptions, otherwise than by Stewart's testimony, that he was

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the principal in the bond. It is every day's practice to establish the competency or incompetency of witnesses, by their own examination, either in chief, or on the *voir dire*.

Judgment affirmed.

HOLMES vs. FRESH.

1. It is not sufficient to make a sale purporting to be absolute, a mortgage, that the party executing it, considered it as such: it must be so considered and intended by all the parties thereto.
2. Inadequacy of price alone, is no ground on which equity will relieve against, or set aside a contract.
3. Inadequacy of price, coupled with circumstances which show oppression or command over the maker, will be regarded as a fraud upon him, and entitle him to relief in equity.

Under the general prayer for relief, the court will grant such relief as is warranted by the allegations and proof.

APPEAL from Marion Circuit Court. In Chancery.

LEONARD & BAY, for Appellant.

POINTS AND AUTHORITIES.

1. The answer denies that the transaction was a loan of money, and security for its repayment, and the proof is not sufficient to establish the fact against the denial of the answer and the deed of the defendant. *Thompson vs. Patton*, 5 Littells' Rep. 74; *Clason vs. Morris*, 10 John. Rep. 541; *Flint vs. Sheldon*, 13 Mass. Rep. 445; *Stackpole vs. Arnold*, 11 Mass. Rep. 27; *Aborn vs. Burnett*, 3 Blackford's Rep. 102; 1 Phillips' Ev. 567-571.

2. The bill does not seek to set aside the bill of sale upon the ground of fraud and oppression in procuring it, and therefore under the pleadings, the complainant cannot have relief upon that ground. *Story's Equity Pleadings*, secs. 257, 264.

• 3. If the pleadings were otherwise, mere inadequacy of consideration is no ground of equity for cancelling the bill of sale, and the other cir-

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cumstances in the transaction established by the proof, do not make out a case for the cancellation of the deed. 1 Story's Equity, sections 244, 245; 1 Sugden on Vendors, 316, 327; Low vs. Barchard, 8 Ves. 133; Western vs. Russell, 3 Vesey & Beam, 187; Coles vs. Trecothick, 9 Vesey, jr., 234; Osgood vs. Franklin, 2 Johns. Ch. Rep. 23; 1 Dess. 250, 260; Seymour vs. Delancy, 3 Cowen's Rep. 446; Seymour vs. Delancy, 6 John. Chan. Rep. 222.

4. If the bill of sale is to be considered as a mortgage to secure money loaned, the complainant is only chargeable with the hire actually received by him for the time the slaves were hired out to others, and with a reasonable hire, while they were in his service; and the account settled upon this principle, will exhibit a small balance against Fresh, instead of the balance of \$367 in his favor allowed him by the decree. Head vs. Overton, 1 J. J. Marshall, 559.

S. T. GLOVER, for Appellee.

POINTS AND AUTHORITIES.

The appellee, by his counsel, insists that the bill of sale under the evidence contained in the record, must be regarded in equity, only as a mortgage, and in support of this proposition, he makes the following points :

1. A bill of sale absolute on its face, may, nevertheless, be proved by parol evidence to have been intended as a mortgage. See Tucker's Com. part 2d, 103; 4 John. Ch. Rep. 167; 1 Day's Rep. 133; 1 Paige, 48 and 202; 2 Caine's Cases, 124; 2 Cowen, 324, 246; 15 John. 555; 1 Wendell, 433; 6 John. Ch. Rep. 417.

2. The testimony of Anderson ought to be regarded as being as conclusive upon the question of the character of the instrument, as the testimony of any one witness can be against the answer of the defendant in chancery.

3. That Fresh did not wish to sell his negroes, and when advised by Anderson to do so, refused, but offered to put them in pledge—that they were worth 600 or 700 dollars each; that they could have been sold to negro buyers on the spot, and at the time of the alleged sale, at that price. The declaration of Anderson to Fresh, that any arrangement by which 600 dollars could be secured to him in four or five weeks, would do; the willingness of Anderson to make an arrangement to save all parties—the enormous disparity between the sum alleged to have been given, and the value of the property—the fact that Holmes was

deeply interested to save the land from sale; that he had no money to buy the land with, if it was sold; that he had no money to pay down for the negroes, and could not raise money save by mortgaging the negroes, to pay Anderson; the fact that Holmes, though he affected great unwillingness at first, eventually tells Anderson if he could be secured and had the money, he would advance it, taken into connection with Anderson's subsequent agreement to wait four or five weeks, are circumstances all going to corroborate the statements of Anderson, and in my opinion amply sufficient to overturn the most positive answer.

That such circumstances are entitled to great weight, may be seen from the following adjudged cases: In 5 Binney, 499, property worth \$800 was sold for \$200, with a defeasance to recovery, if paid in three months; Scriviner considered the instrument a mortgage, and it was so held; 3 Dana, 175; 3 Dana 253; 7 John. Ch. R. 43; 2 Am. Digest, p. 186, No. 15, citing Stuart & Porter, 67; 1 Porter's R. 355; 9 Dana, 120; 3 Iredell's Reports, 94; 2 Am. Dig. 238, No. 7, citing 3 Yeager, 513. See also 2 Call, 421; 2 J. J. Marshall, 115, 471; 4 Hen. and Mun. 101.

4. The grounds assumed by Mr. Holmes, that Fresh was in such distress, and under such strenuous necessity, that he was forced to sell to him at 600 dollars, is iniquitous, and cannot be used by him to repel the presumptions, otherwise arising in favor of Fresh, upon the evidence; 2 Atkins, 330; 2 Tuck. 427; 2 Leigh, 150; 2 Cowen, 170; 14 Vesey, 214.

5. If, from all the evidence adduced, the court has doubts as to whether the instrument was intended as a mortgage or sale, the rule of equity is, to incline in favor of the mortgage. 2 J. J. Marshall, 471; 3 Dana, 253; 3 J. J. Marshall, 354-5-6; 5 Littell, 86.

6. It was proper for the court to take an account of the hire of the negroes up to the date of the decree; 1 Paine's R. 202; 2 B. Monroe, 61.

SCOTT, J., delivered the opinion of the court.

This was a bill in chancery brought by Fresh against Holmes and others, in which it is alleged that Holmes became an endorser in bank for Fresh for the sum of \$1000. Holmes was secured against all liability by reason of his endorsement, by a deed of trust on all the complainant's land in Lewis county. Afterwards, in March, 1840, Fresh being pressed with executions, issued on judgments whose liens were anterior to the deed of trust, which had been levied on the lands con-

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veyed by the trust deed, solicited from Holmes a loan of a sum of money sufficient to satisfy the executions. The solicitation was made in less than an hour before the time appointed for the sale. Holmes declined making the loan, saying he had not the money. At this time Thomas L. Anderson, attorney for the creditors in the executions, influenced as well by a desire to save him from entire ruin, as complainant supposed, as to preserve Holmes' lien on the land about to be sold, interfered and offered to Holmes that he would direct the return of the executions if he would advance the sum of \$600. Holmes declared his inability to raise that sum immediately, but thought he could do so in 4 or 6 weeks, if he could be so long indulged, and undertook so to do if Fresh would give him security for its repayment by a lien on three negro men belonging to him. Fresh accepted this proposition, believing it to be beneficial both to himself and Holmes, and Anderson, their attorney, was directed to prepare an instrument witnessing the agreement, which should attach a lien on the negroes mentioned, in favor of Holmes, so soon as he should pay the money. Anderson inquired of Holmes what sort of an instrument he would have; Holmes replied he would rather have a bill of sale, as he thought there would be less difficulty about it than any other sort of instrument. Anderson informed Fresh that the form of the instrument was a matter of no importance, that the intention of the parties would determine its effect, and although it was absolute on its face, yet it could be shown to be a mortgage, or security. With this understanding Fresh avers he executed the bill of sale, supposing that Holmes, so soon as his money, with interest, should be paid, would release all claim to the slaves, and insists that the instrument of conveyance was designed by the parties thereto as nothing else than a security for the payment of money; that it was so understood by the parties at the time of its execution, and it was repeatedly so declared at that time. Immediately after this transaction, Holmes asserted in conversation, that he had purchased the slaves absolutely for \$600. That he had obtained an advantage over Fresh, in consequence of his embarrassment. That his motive in so doing was to compel Fresh to settle with him usurious interest amounting to 6 or \$700, which he had exacted from him on a loan of \$400, at the rate of 20, 25, 30, 35 per cent. The bill charges that the three slaves were worth \$2500 at the time of the mortgages and are now worth that sum, or nearly so, and that at any time, and at any state of the market, more than \$200 a piece could have been obtained for the slaves. In April, 1840, before the \$600, or any part thereof was paid by Holmes, he instituted an action of replevin against Fresh for the slaves, with a view

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to harrass and oppress him, and to constrain the payment of the usurious interest above mentioned. The slaves were replevied, and ever since have been in the possession of Holmes, or of persons claiming under him. Holmes recovered judgment in the action of replevin. The negroes, it is stated, were worth one hundred and twenty-five dollars a piece annually, and have satisfied the debt by their hires. The bill prays for general relief, and refunding of the costs in the action of replevin.

There was a demurrer to this bill, which was overruled, and thereupon the defendant, Holmes, filed an answer, in which he admitted the facts stated in the bill relative to his liability for Fresh as endorser in Bank. G. W. Hawkins was a co-security, and equally secured by the trust in the property conveyed. A saw-mill was on the land conveyed by the deed of trust, and the trust property was worth at least three thousand dollars. The truth of the allegations of the bill respecting the incumbrances on the property by prior judgments is admitted, as is the fact of the same being levied on and about to be sold. Holmes denies that Fresh ever proposed to him to advance any money to relieve the land secured by the deed of trust, but admits that Thomas L. Anderson, the attorney for the creditors in the executions, expressed to him a desire that he would aid his (Holmes) old friend, by satisfying the executions under which his property was about to be sold. Holmes replied that he had no inclination to assist Fresh; that but a few days since they had attempted to make a settlement, and Fresh threatened to take every legal advantage of him, and that he had lost all confidence in him. When Anderson alluded to his liability as endorser for the bank debt, Holmes informed him that he considered that he was perfectly secured against any loss on that score. Anderson complained of the want of punctuality in Fresh; the frequent disregard of his promises; his indulgence and disappointments, and expressed a determination to sell Fresh's property. Holmes told Anderson during their conversation, that if he had the money he might aid Fresh notwithstanding his conduct, but that he had not the money, and felt no inclination to trouble himself with the matter. Anderson proposed to Holmes, if he would pay the money in a short time he would return the executions. Holmes declined doing this, and there he alleges the matter ended, and he was determined to have nothing more to do with it than to become a bidder at the sale. He admits that he refused to advance money to Fresh, and positively denies that he ever did loan or advance money to him, whose repayment was to be secured by a lien on slaves. He had made an arrangement which rendered him easy on the subject of the

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bank debt. Anderson, who had left him with a determination to sell the land, as he supposed, some time afterwards, and just before the sale was to have commenced, came to him while he was in the court house in conversation with G. W. Hawkins, and said "go and buy Fresh's negroes." Holmes answered that he did not know that he wished to sell them. At Anderson's suggestion, however, he went to complainant, Fresh, and offered him \$600 for his three negro men, which he would pay Anderson in the course of three or four weeks. Fresh accepted his offer. Holmes returned immediately to the court house with Hawkins, and in his presence communicated to Anderson the contract he had made, and requested him to write a bill of sale, which was done, and it was immediately executed and acknowledged by Fresh. He positively denies that there was any understanding between him and Fresh that the transaction should be deemed merely a security for the money agreed to be advanced. He made the purchase with a view to save himself from any loss he might sustain in consequence of previous dealings with Fresh. He denies that there was any understanding that Fresh should keep possession of the slaves. They were not present at the time of sale, but some considerable distance away. So soon as he returned home, he called on Fresh for the slaves, who informed him that they were absent at the time, but that he should have them the next day. On that day he went again to Fresh, who told him the slaves were away, but that he should have them next day. On the third day Fresh avoided him, and he finding no negroes, commenced the action of replevin in the bill mentioned, which resulted as is therein stated. The negroes are worth \$1300.

A replication having been filed to the answer, the cause was set for hearing, and on trial, Anderson, the attorney, was examined as a witness, whose deposition is as follows :

"That he wrote the bill of sale, by which Holmes claimed the negroes; that in the spring of 1840, he had various executions against Capt. Fresh, in favor of various persons, and had his land levied on. On the day of sale, called on Mr. Fresh, to know what he intended to do—said he had not the money. I told him he must raise the money. Mr. Holmes, I understood, had a lien, as an endorser on part of said land levied on. I told Fresh, to see Holmes about raising the money; Fresh refused, because there was not a good understanding between them, and said he would have nothing to do with him. I told him that I would see Holmes—saw him—told him I wanted him to raise the money. Holmes told me he had not the money, and I think said, he would not raise it if he had, for there was a difficulty between them

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about their money matters. After several conversations, in which I tried to persuade him to do it, Holmes did not consent. I then told Fresh, that if he would raise six hundred dollars, I would stop the sale—if paid in three or four weeks, would do me. Cannot say whether Holmes was present or not. Finally, there was an agreement between Fresh and Holmes, that Holmes, as I had offered, should pay me \$600, in four or five weeks. Both told me about the agreement, and I accepted the same. I was called on to write the agreement about the negroes, and my impression is, that I asked Mr. Holmes, what kind of instrument I should draw, and that he said a bill of sale, as there would be less difficulty about it than any other. I told Mr. Fresh, it would make no difference what kind of instrument was drawn, as the intention of the parties, would give character to the instrument. I cannot say that Holmes was present and heard such statement to Fresh, but they were both in the court house at the time. I cannot say what the understanding of Mr. Holmes was, as to the instrument; mine was, that it was a mortgage. It was during court—my business was urgent and pressing, and it is impossible for me to recollect distinctly what occurred. I was anxious for Mr. Fresh to make any arrangements, for I did not want to sell his land nor injure Holmes and Hawkins. I advised Mr. Fresh to sell his negroes and raise the money. He said he would not sell them, but offered them to me to keep, until the money was paid. I refused to take them. I recollect no conversation, if any, that passed between Mr. Holmes and Mr. Fresh, at the time of drawing the bill of sale.

"My understanding was that the bill of sale was a mortgage—cannot tell how I derived that impression, but supposed that I did from the parties. It may be possible that I derived that impression from conversation with Mr. Fresh. Slaves about that time, were worth 6 or 800 dollars each—ready market at \$600. As to the allegations in bill, my impression is, that I turned round and told Mr. Fresh, that it would make no difference what sort of an instrument was given, the intention gave character to the instrument. Whether Mr. Holmes heard, or not, I cannot say. My impression is, that he was present, but cannot be certain. I learned that Mr. Holmes had taken out a writ of replevin for said negroes, at which I was utterly astonished."

On cross examination witness said :

"That he supposed it would be the interest of Holmes to pay the money, as he was endorser. Holmes declined advancing money. I think I told him when I left him, that I would make a sale, for it was my intention so to do. Negroes not then levied on. I think it probable

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that I advised Holmes to buy slaves, as I advised Fresh to sell. I saw George Hawkins present several times with Holmes that day. Fresh would not go to Holmes, and Holmes manifested no anxiety to interfere. I had indulged Mr. Fresh, and had returned executions several times, and was desirous of saving both Fresh and Holmes from injury. I heard nothing said about interest. I do not think that Holmes would hire money at six per cent. I thought he might advance money to save the security he had on Fresh's land. I had a conversation with Mr. Bryant—I may have told him it was a mortgage—think it probable; if so, I meant a mortgage in law, not in form—don't pretend to recollect conversation—cannot say—would not deny that Holmes said to him after sale, "I have bought the negroes," though I have no recollection of it. Do not recollect the terms of the contract, nor the words spoken at the time. I was not present at the making of the contract. I understood it to be a mortgage—never dreamed of any thing else, but cannot tell how I derived that impression, except from the parties."

Hawkins, a witness, was likewise examined, who deposed as follows:

"He was at Monticello, the time of sale of negroes from Fresh to Holmes. Mr. Holmes and witness had a deed of trust upon land levied upon by execution, of which Anderson was attorney, of older date than the deed. Anderson said to Holmes, "buy Fresh's negroes," Holmes said, "he won't sell them," Anderson said "I will go and see him." He went out—came back and told Holmes that Fresh would sell them. Mr. Holmes then went out—came back and said he had bought them, and called upon Mr. Anderson to write the instrument. Then they walked into the bar—Mr. Anderson set down in the bar and wrote the bill of sale now before the court. Witness felt interested as endorser for Mr. Fresh in Bank, and anxious to secure himself from these executions. Allen Hawkins was to purchase land levied on, of Holmes, if Holmes should buy on execution. Did not see Fresh and Holmes together, before the sale that day. Heard Thomas L. Anderson ask Holmes to advance money, but Holmes said he had gone as far as he could for Fresh. Witness was present with Holmes when he went after the negroes, then working on the State road. Fresh told Holmes to come the next day and he would deliver them up. The reason given by Fresh, why he did not deliver them up, was, that they had gone to Newark. Suit in replevin was brought on the next day, or the day but one after. Fresh made no claims, nor said anything about its being a mortgage, or its being a loan of money.

Cross examined.

"I state the substance and sometimes the words of the conversation

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detailed. Anderson wanted Holmes to help Fresh, which he refused. Anderson then told Holmes to buy Fresh's negroes. Holmes said, "He will not sell," or words to that effect. Then Anderson said, "I will go and see." Anderson went and saw Fresh, and returned in about five minutes, and said, "Mr. Fresh will sell." Anderson went but once to see Fresh. Anderson said he would not wait fifteen minutes before he sold—said he would wait on Holmes a few weeks for the money. Witness had no interest in the purchase of the negroes. Witness is the particular and intimate friend of Holmes. It was not long after sale before he was ordered to sell on the deed of trust. Can't now state the amount of land levied on—knows that the mill tract was levied on, as he had an interest in it—the land levied on, 5 or 6 eighties, was subject—\$1000 due Bank—a deed of trust to Holmes—about \$1200, and Anderson's executions. Holmes got the money to pay the \$600 to Anderson, of Mr. Bryan, who advanced on two of the negroes \$800,—this was shortly after the sale. Allen Hawkins is now in Kentucky. At the time of the sale, he had two or three hundred dollars. It is proper for me to state, that Holmes, the defendant, told me that I was mistaken about my statement, that Anderson went to see Fresh, to know if he would sell the negroes. Holmes says, that he, Holmes, went to see Fresh himself, that Anderson did not go. I think Anderson and Holmes both mistaken. I was trustee for Holmes, and his surety in the replevin bond, in the suit at law, for the same slaves."

The negroes were worth from \$1800 to \$2000, and would have hired during the different years for different sums—one year for as much as \$125 a piece, another for not more than \$75. On the hearing, a decree was rendered in favor of Fresh for \$367 67. Holmes was ordered to to deliver up the slaves to Fresh, and the bill of sale ordered to be cancelled. From this decree Holmes appealed to this court.

From the view we take of this subject, it is not necessary to determine the question, whether a conveyance, absolute in its terms, may, under all, and any circumstances, be shown to have been intended as a security for the re-payment of money, or whether it can only be done in those instances in which it is alleged that the instrument has been drawn in a manner contrary to the intention of the parties, through fraud or mistake.

From the evidence in the record, it does not appear that Holmes ever intended, or consented that the instrument whose nature is involved in this controversy, should be a security for the re-payment of money. Such may have been the understanding of Fresh, and such was the understanding of the witness, Anderson, who had an agency in the nego-

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tiation of the contract, but in order to affect an agreement, the concurrence of two minds is necessary ; it is not sufficient that one party to an instrument of conveyance absolute in its terms, intended it as a mortgage; in order to make it so, such must have been the understanding and intention of the other party likewise to produce that effect. Although Fresh believed he was executing a pledge, or mortgage of the slaves, when he put his name to the bill of sale, yet his understanding of the nature of the transaction, cannot avail him anything, unless he can show that it was communicated to Holmes, and assented to by him.

Independently of the evidence of Anderson, there are but two circumstances of any weight, which conduce to show that the bill of sale was intended by the parties as a mortgage. These are, the great inadequacy of the price given by Holmes for the slaves, and the fact that Holmes was interested in having the executions against the land satisfied without a sale of it, as he had a lien on the same land, subsequent in point of time, to that of the judgments on which the executions had been issued.

Holmes himself says, he was not uneasy about his lien on the land, he declares that he had made arrangements in relation to that matter, which had relieved him from all apprehensions of loss. Nothing is shown which disproves this allegation; on the contrary, circumstances corroborate its accuracy. Those to whom Holmes applied for money were willing to let him have it, and although the sums offered by them were small, yet their willingness to lend, shows the character for fidelity to his undertakings, enjoyed by Holmes; and the fact that Anderson was willing to take his word for the payment of six hundred dollars, in four or five weeks, without any security, whilst it establishes his character for punctuality, shows also, that although he might have been without money at the time of sale, yet he was in no danger, as his promise to pay a short time afterwards, was sufficient to cause a return of the executions. We all know the value of a reputation for punctuality to our engagements, and experience shows how powerful an agent such an attribute is, in procuring relief when we are under pecuniary embarrassments. If the land had been sold, the negroes would have remained liable for the debt for which Holmes was bound for Fresh. These considerations incline us to the belief, that Holmes was not under any great apprehensions of loss, in the event of the land having been offered for sale.

As to the inadequacy of price, it must be conceded that some of the State courts have held, that it was of itself sufficient to convert an

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absolute conveyance into a mortgage. In a question whether an instrument was a mortgage, or conditional sale, the inadequacy of price has been held conclusive, as to the character of the instrument. Thus in the case of Conway's executor's against Alexander, 7 Cr. 218, it was said by Chief Justice Marshall, that excessive inadequacy of price, would of itself, in the opinion of some of the judges, in the case of a conditional conveyance, furnish irresistible proof, that a mortgage, and not a sale, was intended. This, however, was not the opinion of the court. The weight of authority clearly inclines to the opinion, that mere inadequacy of price itself, unless it be so gross and manifest, that it cannot be stated to a man of common sense, without an exclamation at the inequality of it, would not induce a court to set aside a contract to which there was no other objection. Powell in his valuable treatise on contracts, speaking on this subject, says, "inadequacy of price, abstracted from all other considerations, seems of itself, upon revision of the best authorities, to furnish no ground on which a court of equity can relieve a party to a contract, the law of England having never fixed any certain proportion, that the price should bear to the thing purchased," 2 Pow. 152.

If the two foregoing circumstances will not justify us in regarding this bill of sale as a mortgage, we will next advert to the question, whether when taken in connection with the evidence of Anderson, they will have that effect. In the consideration of this proposition, it must be borne in mind, that the answer of Holmes, the defendant, being responsive to the bill, can only be overthrown by the evidence of two witnesses, or one witness with strong corroborating circumstances. That answer must be taken as true, unless its falsity is demonstrated in the manner thus pointed out. Holmes asserts positively, that he never agreed to receive any other instrument of conveyance than an absolute bill of sale. Anderson no where in his deposition, avers positively, that Holmes knew that it was the intention of Fresh, that the transaction should be a mortgage. Of some things in connection with this matter, he speaks positively, in such a manner as to leave no doubt on the mind, that he is convinced of the existence of the facts, about which he is testifying. But it is remarkable, that throughout his whole history of this affair, whenever he speaks of the knowledge of Holmes, respecting the nature of the agreement, his assertions are accompanied with qualifying phrases, which detract very much from their force, and infuse into the mind doubts, as to the knowledge of Holmes of the fact, that Fresh intended the bill of sale as a mortgage. If a witness speaks with diffidence, and a mistrust of his mem-

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ory of all the facts about which he testifies, more reliance could be placed upon his narration, than on facts testified to doubtfully in a story, when the existence of some other circumstances is asserted with assurance, and that of others with uncertainty, especially if those about which there is any doubt, are as important as those concerning which there is none. Anderson may never have dreamed that the instrument was intended as any other thing than a mortgage, but still that does not show that Holmes knew it was so intended. He says he was astonished when he heard of the action of replevin instituted by Holmes, to obtain possession of the slaves. But Fresh himself, if the witness may be believed, was not astonished. He made no complaint when the slaves were demanded, but promised to deliver them again and again, and failed to comply with his engagements, before suit was commenced. It is not very strange that Holmes, who is represented as a "hard man, reaping where he has not sowed, and gathering where he has not strewed," exacting 20, 25 and 30 per cent. for the loan of money, should have agreed to advance \$600, without any stipulation respecting interest, and without even taking a security evidencing the existence of the debt. The fact that he had an interest in having the executions satisfied without a sale of the land, need not have prevented him from making a good bargain with Fresh, for the use of his money. Whatever Holmes' anxiety on the subject may have been, Fresh's was ten fold greater, and the unfortunate man seems to have been in that situation, that it could not be said he was master of his own conduct. In the case above cited from Cranch, in which the dispute was, whether the contract was a conditional sale or mortgage, Ch. Jus. Marshall says, "the want of a covenant to repay the money, is not complete evidence that a conditional sale was intended, but it is an important circumstance, for it is a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor, either reserved in express terms, or somehow existing." It is not pretended that the mortgaged property was, under the contract, to have been delivered to Holmes, as at once an evidence of his debt, and the security for its repayment; so far from it, the witness testifies that he was astonished when suit was brought by Holmes, to obtain possession of the slaves. It is admitted on all sides that there was a misunderstanding between Holmes and Fresh, such an one as prevented any hopes being entertained by Fresh, that Holmes would render him any assistance. The enquiry spoken of by Anderson, and on which so much stress was laid by counsel, as having been put to Holmes when about to draw the bill of sale, is open to the observations

above made on his testimony. He speaks positively about Fresh's understanding of the contract, but when he comes to Holmes, his language is changed, and he only has impressions as to Holmes' knowledge of the agreement. A witness testifies that Anderson directed Holmes to go and buy Fresh's negroes. Fresh himself refused to see Holmes on the subject of raising the money to satisfy the executions. Anderson says he cannot say what Mr. Holmes' understanding was, as to the nature of the instrument. After the most deliberate consideration of this matter—after weighing the evidence with that care that the importance of the controversy demands, we have been unable to come to the conclusion that Holmes never understood, or was informed, before the execution of the bill of sale, that it was designed as a mortgage. Such a character can only be given to the instrument, by an interpolation into our code, of the principle that mere inadequacy of consideration will convert an absolute conveyance into the security for the repayment of money. The evidence that would produce this effect, should be clear, and such as leaves no doubt on the mind.

It has been said that mere inadequacy of price, abstracted from all other considerations, is not sufficient to induce a court to afford relief against a contract or to set it aside. If a person with his eyes open will make a bad bargain, he must suffer by his own imprudence; he has no right to complain, no title to apply to equity for relief. But this circumstance when connected with others, which show that the person did not understand the bargain he made, or was so oppressed that he was glad to make it, knowing its inadequacy, will show a command over him, which amounts to fraud. Newland on Contracts, 539. In the case of Osgood against Franklin. 2 J. C. Rep. 24, Chan. Kent says, "the doctrine is settled, that in setting aside contracts on account of inadequate consideration, the ground is fraud, arising from gross inequality." Unless the inadequacy does of itself, *ex evidentia rerum*, prove fraud, the rule is, says Chief Baron McDonald, that inadequacy by itself, has not the weight suggested. If indeed advantage be taken on either side, of the ignorance or the distress of the other, it affords a new and distinct ground, not applicable to this case, and a very great inadequacy may form a presumption of oppression. 1. Wighticks Rep. 28, 29, Cows vs. Heaps, 3 Ves. & Bea. 117. The same doctrine is maintained in the case of Nelson vs. McDonald, 6 J. C. Rep. 211. These principles when applied to the circumstances of the case now under consideration, would warrant us in extending some relief against the oppressive contract, into which Fresh has been forced by his pecuniary embarrassments and distress. The great inadequacy of the price

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received for the three slaves, being less by \$1200 than their real value, the fact that a large and valuable landed estate, on which great sums of money had been expended, was on the eve of being sacrificed—that the defendant had the complainant in his power by virtue of a deed of trust, the money secured by which it appears from the evidence, was then, or in a short time due—the misunderstanding of the parties in relation to the nature of the contract, are circumstances which would justify a court of equity in setting aside this conveyance.

As to the objection, that the prayer of the bill is not for this species of relief, it may be answered, that there is a prayer for general relief, under which a court will make any decree warranted by the allegations and proofs in a cause. The allegations of the bill afford an ample justification for this course. The case of *Hepburn & Dundas vs. Dunlop, &c.*, 1 Wheaton 179, is one showing the liberality of courts in extending relief under the general prayer.

The decree of the court below is reversed, and it is ordered, adjudged and decreed, that William H. Holmes, the defendant deliver up to James Fresh, the complainant, the said three slaves, viz: Abram, Ben and David, so soon as the said Fresh shall pay to him the sum of six hundred dollars; and that the said Holmes deliver to the said Fresh, the said bill of sale, to be cancelled, and that Holmes pay the costs of this suit incurred in the court below, and that Fresh pay the costs in this court.

MORROW & HARRISON vs. SHEPHERD.

1. A party cannot be compelled to dismiss his suit for failing to give security for costs, until an order to that effect is made.
2. The security in a replevin bond, is not bound for the costs of the suit.

ERROR to Howard Circuit Court.

TODD & HAYDEN, for the Plaintiffs.

The plaintiff insists upon these points:

1. It was against law to enter a *non pros.*, or non-suit the plaintiffs without a rule absolute to give security for costs.

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2. The bond given upon the replevin, was sufficient to secure all damages and costs.
3. The court should have set aside such *non pros.* on motion.
4. The court erred in amending the judgment at a subsequent term, against the security in the replevin bond.
5. There was nothing in the record to amend by.
6. Such judgment could not be made after the term when the original judgment was entered.
7. The party had no notice of the motion to amend.

LEONARD & CLARK, for Defendant.

The counsel for the defendant will rely, in support of the circuit court's judgment, upon the following

POINTS AND AUTHORITIES.

First. The security in the replevin bond is liable as well for the costs, as for a return of the property, and the payment of the damages. The costs are incident to the recovering of the property, and all who are liable to the recovery, are liable for the costs. Rev. Stat. of 1835, 528, title Replevin, sec. 8 & 9.

Second. The omission to enter up the judgment against the security in the replevin bond for the costs, as well as for the property and damages, was a mere clerical mistake, and was amendable at a term subsequent to that in which the final judgment was entered. See 1st Cow. 189, the People vs. McDonald & Dobbs; R. S. 1835, title Practice at law, article 6, sec. 7 & 8.

Third. There was no necessity for the security to be in court, to enable the court to make this amendment, and if there were any such necessity, he will have been considered to have been there, for the purpose of this amendment. 14 Peters' U. S. Rep. 155.

This suit was not dismissed for want of security for costs, nor was any application made by the plaintiff to set aside the non-suit, and the ground that the court had dismissed the suit for want of security for the costs.

TOMPKINS, J., delivered the opinion of the court.

Willis B. Morrow brought an action in the circuit court of Howard county, against James Shepherd, to recover two slaves claimed by Morrow. Benjamin Harrison was security for Morrow on the bond, which the statute required him to give before the execution of the writ

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of replevin. The circuit court gave judgment in favor of Shepherd, to recover against Morrow, and Harrison his security in said bond, the said negroes, or their value, and double damages.

At a subsequent term, the defendant's counsel moved to amend the judgment for costs before entered up against Morrow, by entering up a judgment against Morrow, and Harrison his security in the replevin bond, for costs in this cause. The court permitted the judgment to be so amended.

The bill of exceptions shows that the defendant moved the court to dismiss the cause, because security for costs had not been given by the plaintiff, according to the order of the court. On the making of this motion, the plaintiff was called, and was non-suited, and he then moved the court to set aside the non-suit, because the rule on the plaintiff to give security for costs, was illegal, and the bond given on suing out the writ of replevin, secured the defendant in all the costs of this suit. This motion was overruled. The entries on which this motion of the defendant to dismiss the plaintiff's suit is grounded, are as follows, viz :

"Shepherd ads. Morrow, in the Howard circuit court, June term, 1841.

"The defendant moves the court for a rule upon the plaintiff to give security for costs in this cause, for the following reasons: The plaintiff is unable to pay the costs of the suit.

"At the succeeding term of October the defendant by his attorney, moved the court to dismiss the suit, no security for costs being given by the plaintiff in accordance with a rule entered herein at the last term of this court. Whereupon the said Morrow being called, comes not, nor doth he prosecute further his said action against said Shepherd. It is therefore considered," &c.

No rule or order of the court appears on the record, requiring Morrow to give security for costs. The defendant's motion for such rule appears on record, but no rule or order to that purpose was entered up. Therefore, for the present purpose, it is quite immaterial whether or not, it be illegal to make such an order.

The 5th section of the act regulating the action of replevin, requires that no writ of replevin be executed, until the plaintiff enters into a bond to the officer to whom the writ is directed, with sufficient security, in double the value of the property, to be ascertained by the officer, conditioned that he will prosecute the suit with effect, &c., make return of the property, if return thereof be adjudged, and keep harmless the officer touching the replevying the property. Sec. 5th

The 8th section provides, that if the plaintiff in replevin fails to prosecute his suit with effect, and without delay, the court, or jury, shall

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assess the value of the property taken, and the damages for the use of the same, from the time of suing for the same until the return thereof shall be made as in other like cases.

The 9th section directs that in such case, the judgment shall be against the plaintiff and his securities, that he return the property, or pay the value so assessed, and also pay the double damages assessed for the detention of the property. See pages 526-7, of the Digest of 1835.

It is by the 9th section that the court is authorized to give judgment against the plaintiff and his sureties. But for the provisions of that section, the defendant would be compelled to sue on the bond, to recover the value of the property taken, and the damages for the use of the same, &c., against the security in the bond.

This ninth section directs that judgment shall be given for the value of the property, and the double damages assessed. So far, the law directs that the judgment shall go, but the defendant asks judgment for costs, too. For costs, the statute does not direct that a judgment shall be given against the security. Without the authority of the statute, no judgment could be rendered in this action against the security in the replevin bond; the court, then, cannot be required to transcend the power granted by the law, and make the security in this bond liable in this action for the costs of the suit. The 5th and 6th sections of the act concerning costs, gives costs to the successful parties in the record. Digest of 1835. Harrison was surety in the replevin bond, and no party to this record.

The circuit court then committed error: 1st, In compelling the plaintiff, Morrow, to suffer a non-suit for failing to give security for costs, when no order to that effect had been made; and 2d, in rendering judgment for costs against the security in the replevin bond.

Judgment reversed and cause remanded.

LITTLE vs. MERCER.

1. An action of debt will not lie for the non-performance of a contract under seal, if the damages are unliquidated, but will lie on a covenant to pay a sum certain even where secured by a penalty.
2. A person who is prevented by the other party from completing a contract, is entitled to recover as if the contract were completed: he cannot abandon the contract and sue on a *quantum meruit*.

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3. Although a declaration be defective in the *queritur*, if it contain a statement of the cause of action sufficient to apprise the defendant of the nature and extent of the grievance he is to defend, it is sufficient.
4. An allegation that "*defendant had read and prevented the plaintiff from completing the work, by throwing down a part,*" is sufficient.

ERROR to Platte Circuit Court.

JONES, for Plaintiff.

POINTS AND AUTHORITIES.

1. That Mercer, by interfering with the work against the consent of Little, and throwing off the stone from the abutment, where they had been placed by him for the purpose of constructing the work, is such an act of forcible prevention, as discharged him from the performance of the contract. 6 Mo. Rep. 160, and authorities there cited.

2. That Little was entitled to recover the value of the work done by him on the abutments, on the common counts, Mercer being the cause why the contract was not performed.

LEONARD & BAY, for Plaintiff.

POINTS AND AUTHORITIES.

1. The first, or special count in the plaintiff's declaration is bad. Debt will not lie for the non-performance of a contract under seal, where the damages are unliquidated. The amount which the plaintiff might be entitled to recover, would depend upon the opinion of a jury, and is entirely uncertain. 1 Chitty Pl. 124, 128, 7th Am. ed.; 1 Saunders on Pl. 404. Covenant was the proper form of action, 1 Chitty P. 134.

2. The first count is also bad, because the plaintiff has not declared upon any debt due to him from the defendant; also, because he has not shown any sufficient excuse for not performing his contract.

3. The evidence offered under the common counts was properly rejected: the plaintiff could not waive his agreement, and recover under the common counts for work and labor. Clendennin vs. Paulsel, 3 Mo. Rep. 166, 2 ed.; Helm vs. Wilson, 4 Mo. Rep. 41.

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NAPTON, J. delivered the opinion of the court.

This was an action of debt, upon a sealed instrument, to recover the price agreed to be paid to plaintiff, for building the abutment of a bridge. The declaration contained a special count upon the covenant, and the common counts.

This covenant between the parties which is set out in the declaration was about as follows: the plaintiff agreed to put up two abutments, in a style and manner particularly described; the defendant furnishing the materials, stone, lime and sand, and to be finished by the 25th December, 1842; in consideration whereof, the defendant agreed to pay \$1700; eleven hundred to be paid on the completion of the work, and six hundred on the first of September, 1843. It was further agreed, that if any change should be determined on by the county court, or bridge commissioner, the plaintiff was to conform his work to such changes, at a price duly proportioned to the contract price heretofore agreed on.

The first count in the declaration sets forth this agreement in substance, and averred, that an alteration was on the 4th August, 1842, agreed upon between the county court and the defendant, and that he did, on the 5th August, 1842, commence said work according to the terms of said indenture, and alteration aforesaid, under the direction and superintendence of the bridge commissioner, and was proceeding to finish and complete the same according to the terms of said indenture and alteration aforesaid, and was then and there ready and willing to do and perform said work, and would have finished and completed the same according to the terms of said indenture and alteration aforesaid, but that he was hindered, delayed and prevented from finishing the same, by said defendant, then and there violently, wilfully and forcibly throwing down off of, and from the said eastern abutment, a large quantity of stone, to wit: ten perch, into the river, against the consent and will of the said plaintiff, and which stone said plaintiff had placed at and upon said eastern abutment, for the express purpose of constructing the same, according to the terms of said indenture, &c. Whereby an action accrued to the plaintiff, to demand and have from the defendant, the said sum of \$1700; yet the said defendant, though often requested, &c., &c.

To this declaration, the defendant specially demurred; but at a subsequent term of the court withdrew his demurrer, and filed seven pleas. 1, *Non est factum*. 2, as to the common counts, *nil debet*. 3, That plaintiff did not perform and complete the stone work of said abutments, according to the terms of said agreement, nor was he hindered

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and prevented from so doing, by said defendant, as alleged, &c. 4, That plaintiff did not perform a part of said stone work, as by the agreement and alteration he was to do, nor was he prevented from doing the remainder thereof, as alleged, on or before the 25th December, 1842, &c. 5. The plaintiff did not put ten perch of stone on the eastern abutment, for the purpose of building the same, and that said defendant did not throw the same down into the river, &c. 6. That said plaintiff did not perform said stone work, nor any part thereof, as he was by said indenture bound to do; but on the contrary was so lazy and negligent, that when said 25th Dec., 1842, arrived, he had not completed one-fourth part thereof, nor was he hindered or delayed by said defendant, &c. 7, *Nil debet, generally*, to the whole declaration.

Plaintiff took issue on the first, and demurred to the other pleas, setting forth the causes of demurrer specially. Upon this demurrer, the court held the first count of the declaration insufficient, and overruled the demurrer of the plaintiff to the second plea, and sustained the demurrer to the seventh plea. No disposition was made of the 3d, 4th, 5th and 6th pleas. The plaintiff went to trial on the common counts, and offered the sealed agreement, heretofore referred to in evidence, which was excluded. The plaintiff then offered to prove that he had done work on the abutments worth five hundred dollars; and that defendant had neglected to dig out, and prepare the foundations for the abutments, in time for the plaintiff to finish his work before the 25th December, 1842; and that defendant had prevented plaintiff from completing the said contract, by throwing down one of the abutments, &c. All this testimony the court rejected, and the plaintiff took a non-suit, and moved to set it aside, which motion the court overruled. The plaintiff excepted, and brings his case here by writ of error.

The principal questions rising on the record, are:

First, Will the action of debt lie; and

Second, If so, is the declaration good on general demurrer; and

Third, Was the evidence offered admissible under the common counts.

The position assumed by the counsel for the defendant, that an action of debt will not lie for the non-performance of a contract under seal, where the damages, are unliquidated, is believed to be indisputable; but it is equally well established, that an action of debt, as well as covenant, will lie for the recovery of a sum certain, due by covenant. Even where the performance of the covenant is secured by a penalty, the plaintiff may at his election, sue for the penalty, or for the rate agreed upon in the covenant. Thus, in *Ingledeu vs. Crips*, (1 Salk. 658,) the defendant covenanted to pay the plaintiff so much per hundred for every

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hundred stacks of wood in such a place, and bound himself in a penalty for the performance, the plaintiff brought debt for a sum exceeding the penalty, and the action was sustained. The court said that the plaintiff may have covenant or debt, at his election, for the rate being certain when the defendant has the wood, the agreement becomes certain for which debt lies. Had the plaintiff in this case performed his covenant, there can be no doubt that he could have maintained an action of debt for the price agreed to be paid him for his services. But if he is prevented from performing his covenant by the act of the defendant, how will that circumstance affect his remedy? Will he be at liberty to treat the covenant as though it was performed, and go for the whole consideration; or must he resort to his action of covenant, and be allowed such damages for the work he has done, and for the inconvenience and expense he has been put to?

It seems to be settled, at least in our courts, that where there is an express contract unrescinded, and unexecuted, a plaintiff who has done work under such a contract, cannot abandon the contract and sue on a *quantum meruit*. If he recover at all, he must recover on the contract, and if the contract be under seal, his form of action must be adapted to a contract of this character. *Clendennin vs. Paulsel*, 3 Mo. Rep. 230; *Helm vs. Wilson*, 4 Mo. Rep. 43; *Crump vs. Mead*, 3 *Ibid.* 233.

In *Clendennin vs. Paulsel*, the court said that "if the defendant prevented the plaintiff from fulfilling his contract, then he may sue on the covenant and allege the prevention, and will be entitled to his money as if he had performed the covenant." In *Helm vs. Wilson*, which was a later case, the court observed: "It is a general rule of law, that a contract must be performed according to its terms, before the party can have any right of action. This rule, however, is subject to some qualifications. One is, that "if the other party will prevent the execution of the agreement, that the action will lie, and the plaintiff's right to recover is as complete as if the contract had been fully executed." In another part of the same opinion, the court declare, "that in such cases, the plaintiff may recover the worth of the labor at least, or he may recover for the whole as if performed." The case of *Labeaume vs. Hill & Kees*, proceeded on a different principle. That, and the case of *Linningdale vs. Livingston*, 10 John. 36, were based upon the doctrine in *Keck's case*, cited and approved by *Butler*, that when a man does work for another, under a special agreement, but not done in time, or manner called for by such agreement, he shall recover for the work done upon a *quantum meruit*. These cases seem to have

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been occasionally misunderstood or misapplied, and the doctrine has been questioned or denied. Certainly the doctrine is to be understood with reference to the facts of each case, and with certain qualifications. It supposes a performance of the contract, with variations from the same, probably with *the assent of both parties*, or an extension of the time within which the agreement was to be performed with the like assent. Such was the understanding of the case of *Linningdale vs. Livingston*, by Judge Spencer, as he declares in the subsequent case of *Jennings vs. Camp*, and so understood, the principle is unexceptionable.

It is, however, unnecessary to enter into any examination of the distinction taken. It is at least certain, that if the authority of *Paulse vs. Clendennin* be observed, the plaintiff could sue on the covenant, and recover the contract price of the work, as though it had been completed.

The next question concerns the sufficiency of the declaration on general demurrer. The first objection taken is to the *queritur* in the declaration. The declaration commences in these words: "J. L. complains of T. W. M. in a plea of debt, for whereas, &c., &c." The usual form is departed from, and no sum whatever is stated. In the court of Kings Bench, where the proceedings are by bill, Lord Loughborough held that the *queritur* might be rejected as superfluous; *Lord vs. Houston*, 11 East. 62. Even in the common pleas, where the sums declared for, exceeded the sum in the writ, it is only a matter of abatement, and cannot be pleaded in bar. *McQuillen vs. Cox*, 1 H. Bl. 249. According to our practice, the declaration accompanied the summons, and constitutes the first step in the institution of a suit. It is certainly necessary that it should contain a sufficient statement of the plaintiff's cause of action, to apprise the adverse party of the nature and extent of the grievance which he is called upon to defend, and that this statement should conform substantially to the established forms of pleading. The latter part of the declaration now under consideration contains what is sufficient fully to apprise the defendant of the character of the demand, and is in the usual form.

The second objection made to the declaration is that the plaintiff does not allege any sufficient excuse for not performing his contract. The Plaintiff avers that he had commenced, and was proceeding to finish the work, according to contract, but was hindered by the defendant hrowing down from the eastern abutment, a large quantity of stone, to wit: ten perch, which had been placed there for the purpose of constructing the same. This is surely a sufficient act of prevention. The

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plaintiff did not contract to build the wall more than once, or to rebuild it, as far as it might be thrown down by the defendant. It was impossible for him to proceed in the work without replacing the rock which had been thrown down, and that he was not bound to do.

In relation to the evidence offered under the counts of *indebitatis assumpsit*, it was not admissible, according to the decision of this court in *Clendenin vs. Paulsel*.

Judgment reversed and cause remanded.

GRIGG & FINCH vs. BODRIO.

1. A party who is liable to be called on as a witness, by his adversary, in a justices' court, is equally liable in the circuit court on an appeal.
2. Where there are more than one plaintiff or defendant to a suit, originating in a justices' court, and the testimony of such parties is desired, all should be required to testify. The testimony of those required to testify, or in the event of their refusal, then the testimony of the opposite party can only be used against such as are called upon to testify, and is no evidence against the others.

APPEAL from St. Louis Court of Common Pleas.

NAPTON, J. delivered the opinion of the court.

Bodrio sued Grigg & Finch, before a justice of the peace, on an account for work and labor, amounting to ninety dollars. A verdict was given in his favor for eighty dollars, before the justice, and a judgment accordingly, from which Grigg & Finch appealed. In the court of common pleas, Bodrio obtained a verdict for \$97 22, and a judgment was rendered for the amount, and costs. From this judgment an appeal is taken to this court.

On the trial before the court of common pleas, the plaintiff failing to make out his case, called upon one of the defendants, Grigg, who had been regularly subpoenaed for that purpose, and who had testified upon the trial before the justice. Grigg not appearing, the court permitted the plaintiff himself to testify. To this the defendant excepted.

It appeared from the testimony of the plaintiff, that in December, 1842, he commenced the manufacture of smut machines for the defendants; that the bill upon which this suit was instituted was correct; that the defendants owed him more than one hundred dollars on account

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of his work, but in order to bring the amount within the jurisdiction of the justice, he had reduced it to ninety dollars ; that the plaintiff was to be allowed whilst employed in making smut machines, two dollars and fifty cents per day, and was to be paid whilst the machines progressed enough to support his family, the balance out of the proceeds of the sales of the machines ; that defendants sold two machines whilst plaintiff was in their employment, one for \$150, and the other for \$175 ; that defendants failed to furnish plaintiff with money enough to support his family ; that plaintiff was discharged by defendants.

The defendants then offered testimony to show that the plaintiff whilst employed by the defendants in the manufacture of smut machines, proposed to form a partnership with others, for the manufacture of similar machines.

The court directed the jury to disregard the testimony relative to propositions of partnership from the plaintiff to others, and instructed them that the plaintiff was entitled to recover the amount of wages agreed upon, if they believed there was such an agreement, and without reference to any misrepresentations, as to the value of the machines, or any proposals for partnership with others, &c.

No particular objections have been suggested to the instructions of the court, nor have any occurred to the court in looking over the record. The principal error assigned, and the only one we presume, designed to be urged, is the permission given to the plaintiff to testify in his own behalf. This point is not without difficulties, depending as it does, entirely upon the construction of a statute, the language of which might admit of a construction either way.

The 16th and 17th sections, of the 5th article of the act concerning justices' courts, authorizing either party to a suit on a contract, to have the opposite party sworn, and if the opposite party refuses to testify, or being subpœnaed, refuses, or fails to attend the trial, the party so appealing to his adversary, is allowed to testify in his own behalf. But it is provided that after either party testifies, no other evidence in relation to the matter is admissible.

The first question which presents itself is, whether this rule of evidence is at all applicable in the circuit court? In the case of *Martien vs. Burr*, 5 Mo. Rep. 103, the court alluded to this question, but declined giving any opinion about it. We do not see any reasonable grounds for questioning this practice. When a case originally tried before a justice of the peace, is transferred to the circuit court, and is there tried *de novo*, the trial in the circuit court must necessarily be conducted upon the same principles which govern in the trial before

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the justice. Whatever rules of evidence may therefore be prescribed by the statute, for the regulation and conduct of suits before the justice, must prevail in the appellate court to which suits are removed, and in which the party appealing gets merely the benefit of a new trial, before a more enlightened tribunal, without deriving any advantage from the errors which may have been committed to his prejudice by the magistrate.

We will take it for granted then, that if the provisions of the statute authorized the plaintiff to testify before the justice, the same circumstances would have warranted his admission in the court of common pleas. The question then recurs, is this a case within the statute?

The statute allows either party to rely, if he chooses, upon the conscience of the adverse party. This is obviously founded upon the principle, that the interest of the party thus appealed to, is decidedly against the party calling him, and if he testifies favorably to the party calling him, he is testifying against his own interest; if unfavorably, there is an end to the matter, as the plaintiff by calling him, admits his credibility and integrity. If the party so called on, refuses to testify, or fails to attend the trial, then the party calling him is permitted to make out his case by his own testimony. And this is clearly a mere incidental, or conditional privilege extended to him, on account of the conduct of his adversary, which affords a reasonable presumption from his silence, that his refusal to testify, arises from a consciousness that he cannot consistently testify to any thing favorable to himself.

So far this statute is plain enough: the difficulty arises in applying the provision to cases where there are several parties, on either side. Can the admissions of one defendant operate against his co-defendants, or which is the same in effect, will the absence, or refusal to testify, of one defendant, let in the evidence of the plaintiff? And if so, will such evidence be permitted to affect his co-defendants? Such a doctrine is certainly very repugnant to the general law of evidence; and unless it be very apparent that it was the intent of the Legislature to introduce this change, it would hardly be the duty of the courts to adopt such a construction. The law uses the word partly in its collective sense, as embracing all the individuals standing in the attitude of plaintiffs or defendants, and full effect will be given to the terms of the law, if the operation of the testimony admitted, be confined to the party who has been summoned and fails to attend, or who attends but refuses to testify. The testimony of the plaintiff in the present action, may have been admissible against Grigg, the defendant, who had been subpoenaed, just as the testimony of Grigg himself, would have been

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evidence against himself; but neither the letter or policy of the statute requires us to hold, that such testimony should have any influence against Grigg's co-defendant, Finch.

Where then there are several parties on the same side, it is the duty of the party desiring to avail himself of the privilege conferred by this statute, to summon all of the adverse parties, and his right to testify himself, must depend upon the failure of some one of the parties summoned to attend the trial, or the refusal of some one of them to testify.

The case of *Levy vs. Hawley*, (8 Mo. Rep. 511) is not entirely like the present. In that case, James Edgar, against whom a judgment had gone, from which he did not appeal, was called on by the plaintiff to procure a judgment against Levy, who had been his co-defendant before the justice. Levy had summoned Edgar, and been permitted to sever from him in the appeal. So that the result of the trial in the circuit court, could in no way diminish Edgar's responsibility. *Perry vs. Block*, (1 Mo. Rep. 342.) The witness was manifestly interested in making levy share his responsibility, admitting as he had done, that he himself was at all events liable. The remarks of the court, however, in deciding against the admissibility of the witness were applicable to the facts now presented, and we still think, as we did then, that it was not the design of this statute, to permit the statements of one defendant to be used either directly or incidentally, to the prejudice of a co-defendant.

Judgment reversed, and cause remanded.

FINNEY, ADM'R. OF McCALISTER, vs. THE STATE, TO THE USE OF ESTISS.

1. A plea alleging that suit was not brought within three years after the grant of letters of administration is bad. It should allege that the cause of action had accrued more than three years before suit brought.
2. A cause of action accruing after the grant of letters of administration, the limitation of three years only begins at the time the right of action accrued.
3. The county court is authorized to revoke the appointment of a guardian for non-residence in the State, although the statute which makes this a cause for removal, be passed subsequent to the appointment of a guardian.
4. A trustee is bound to comply with the statutory provisions affecting the duties incident to the trust, as they are enacted.

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5. An order of a county court removing a guardian, and appointing his successor, is equivalent to an order to pay over any money in the hands of the one removed, to his successor, and he is bound to take notice of the order.
6. In a suit against the executor or administrator of a guardian who had been removed, for money not paid over to his successor, the judgment must be *de bonis testatoris*, and not *de bonis propriis*.

APPEAL from St. Louis Circuit Court.

GAMBLE & BATES, for Appellant.

POINTS AND AUTHORITIES.

In behalf of the appellant, the following propositions are advanced:

1. The demurrer of the defendant, to the replication to the first plea, ought to have been sustained; the replication (infancy) was bad; the plea (limitation) was good. But if the plea were ill, still the declaration was bad.
2. The demurrer of the plaintiff to the 3d and 4th pleas of the defendant, ought to have been overruled. Each one of said pleas was good, and if not, the declaration was bad.
3. The instruction moved, on the part of the defendant, and refused by the court, was a lawful, and proper instruction, and ought to have been given.
4. The motion for a new trial ought to have been granted, because the verdict was wrong, both in law and in fact.
5. The judgment as it is of record, is obviously wrong; it is for the penalty of the bond, \$3600, and also for the damages assessed on the breach, \$1799 89, and costs, and *execution is awarded* for the latter sum, although the defendant is an administrator.

POLK, for the Appellee.

NAPTON, J., delivered the opinion of the court.

This was an action of debt upon a bond given by Joseph Edmondson, as guardian of Edward T. Estiss, with John H. Gay and Alexander McCalister, as securities, conditioned that the said Edmondson would well, and truly, and faithfully discharge the duties of his office, as guardian, according to law. The suit was instituted against the appellant, Finney, the administrator of McCalister, one of the sureties. The breach assigned is, that after the execution of said bond, to-wit: on

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the 15th June, 1840, the said guardianship of the said Joseph Edmondson, was revoked by the county court of St. Louis, the said court having competent jurisdiction and authority therefor, that before, and at the time of such revocation, there was in said guardian's hands, the sum of \$1788 17, the property of said minor; that Meredith Martin was in due form of law, appointed guardian, &c., and that although the said Joseph should have immediately paid over to said Meredith, the sum of \$1788 17, after the revocation of his letters as aforesaid, yet though often requested, he has not yet paid, &c., &c.

The defendant pleaded :

1. That the demand was not exhibited for allowance within three years after the granting letters of administration.

2. That the guardianship of said Edmondson was not revoked by any lawful authority.

3. That the said guardianship was not revoked by the county court of St. Louis, for failing to give supplementary security, or for any other good cause.

4. That said Edmondson had not at the time mentioned in the declaration, in his hands, the sum of \$1788 17; and,

5. That said Edmondson was not at any time before the commencement of this suit, ordered by the county court of St. Louis county, or any court having jurisdiction, to pay over to the said Martin, any money in his hands of the estate of said Estiss, &c.

To the first plea, the plaintiff replied, the infancy of Estiss—to which replication the defendant demurred, and the court overruled the demurrer. The plaintiff demurred to the third and fifth pleas, and the court sustained the demurrer. On the second and fourth pleas issue was joined, and they were found for the plaintiff, and damages assessed at \$1799 87, and judgment rendered against the plaintiff for the penal sum in the bond, and damages aforesaid and costs *de bonis propriis*.

At the trial the plaintiff gave in evidence the records of the county court of St. Louis county, showing the appointment of Edmondson, as guardian, his settlement with the county court, showing a balance against him of \$1768 17, his removal from office on account of his being a resident of Illinois, the appointment of Martin, &c. The defendant moved for the following instruction: "The county court of St. Louis county had not the absolute power, at its discretion, to remove Edmondson from the guardianship of E. T. Estiss. The court could not remove him, except for such cause as the statute points out. And if the jury believe from the testimony, that said Edmondson was removed for no other cause than that he lived in Illi-

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nois, the removal was unlawful, and they ought to find for the defendant." This instruction was refused; a new trial was applied for, and the motion was overruled, and exceptions duly taken and saved, to the several opinions of the court, in the progress of the cause.

The first error assigned is, the action of the court in overruling the demurrer of the defendant to the plaintiff's replication to the first plea.

Admitting that the appellant is right in supposing the replication to be bad, yet if the plea is bad, the court committed no error in overruling the demurrer. The plea alleges that the suit was not brought within the three years after the granting of letters of administration. The statute directs that all *demands* against an estate shall be presented for allowance within three years from the date of letters of administration. It seemed from the declaration, that more than three years since the date of the letters of administration upon McCalister's estate had elapsed, before any breach of the bond signed by McCalister had occurred; and of course there was no demand against the estate during that period. Unless therefore McCalister's death is to be considered an extinguishment of his liability on his bond, for any breaches occurring subsequent to that event, the plea cannot be good. We have heretofore intimated that so literal a construction of the statute would not conform to the general principles of justice, and that cases like the present are not within the rule. The plea should have set forth, that *the cause of action had accrued* more than three years before suit. *Miller vs. Woodward & Thornton*, 8 Mo. Rep. 169; *State, to the use of Menard, vs. Pratte & St. Genome*, Ib. 286. But it is contended that the declaration is bad; first, because the guardianship of Edmondson was not revoked legally; and secondly, because no order of the county court is set forth requiring Edmondson to transfer the money in his hands, to his successor; and thirdly, because there was no notice and demand before suit brought.

The two first objections involve the same questions which arise in considering the action of the court, in sustaining the demurrer to the third and fifth pleas.

The 15th section of act of Feb. 11, 1839, provides that no person, other than a resident of this State, shall be appointed a guardian; and if any guardian remove from this State, his appointment shall be revoked, and proceedings had as in other cases of revocation. The declaration alleges that the guardianship of Edmondson was revoked by the county court of St. Louis county, the said court having competent authority

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and jurisdiction for that purpose. There can be no substantial objection to this allegation of the declaration; but the third plea sets up as a defence, that Edmondson's guardianship was not revoked for failing to give supplemental security, or for any good cause, and as the arguments to sustain this plea are the same which are relied on to show the insufficiency of the declaration, they may as well be considered here. If the revocation was made legally, it is immaterial what the cause may have been; whether it was a failure to give security, or a removal from the State. The legality of the order of the county court which revoked Edmondson's guardianship, was put in issue by the second plea, and the third plea appears to rest on the hypothesis, that the guardian could not be removed, because of his removal from the State, and the argument is, that the act of 1839, was not designed to be retrospective, but only to apply to guardians appointed subsequently to its passage. We are unable to see any objections to the construction of the act of 1839, given to it by the county court of St. Louis county. There is nothing retrospective in the operation of the law, which declares that after its passage, a removal from the State shall be one of the causes which shall authorize the courts to remove guardians, whether they have been appointed before or since the passage of the act. Such a law does not divest any vested rights. Whoever accepts a trust of this character, does so with a knowledge that he must comply with the statutory provisions regulating the duties incident to the relation which he assumes, and that he must continue to comply with such requisitions as may at any subsequent time be made, so long as he holds on to the trust. The guardian is now required to make annual settlements, he may be required to make them quarterly or monthly. A hundred other changes may be made in his official duties, and he is bound to comply with them. No hardship arises from this, for he can if he thinks the trust burdensome or unprofitable, at any time relieve himself of the burden. The plea was therefore bad, and the declaration, in this particular, manifestly sufficient.

The second objection to the declaration is, that it contains no averment of any order of the county court requiring Edmondson to pay over the moneys in his hands, upon his removal from the guardianship. The same matter is set up in the fifth plea. In the case of *Hill & Keese, vs. Chouteau*, 1 Mo. R. 732 (Rep. 526) which was an action upon an administrator's bond, this court was of opinion that the creditor was not obliged to establish his demand in the county court, before proceeding upon the bond. The court observe that if the administrator has not duly administered, his bond is broken, and whenever that fact

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is established, either by the records of the county court, or by any other competent proof, he is entitled to recover. In principle it is difficult to see any distinction, so far as this point is concerned, between an administrator and a guardian.

But it seems to be thought that an order of the county court was necessary to authorize Edmondson to pay over the moneys in his hands to his successor. The order which removed Edmondson, also appointed his successor, and of this order he must be presumed to have had notice. Upon his removal from office, he was in possession of moneys which he had no longer a right to retain. The order of removal was of itself equivalent to an order to pay over to his successor. Were it not so, it would certainly devolve on the plaintiff to show a demand and refusal, upon the general principle that a fiduciary holder of money, with no fixed time of payment, is entitled to notice and demand, before he can be liable by suit. The order of removal in this case, we consider a sufficient notification, there being no statutory provision requiring, as in the case of administrators, any further order, and this view of the case disposes of the third, as well as the second objection to the declaration.

The third and fifth pleas have been considered. The judgment being clearly erroneous will be reversed; and this court proceeding to enter up such judgment as the circuit court should have given, direct a judgment *de bonis testatoris* against the appellant. The appellant is allowed his costs. *Floyd vs. Wiley*, 1 Mo. R. 458.

 MATHENY vs. JOHNSON.

1. In an action of trover, evidence that a trial was had before a constable who had levied on the property, and that the jury found the right to the property to be in the plaintiff, that the defendants indemnified the constable and directed him to sell, and that defendants purchased the property is proper and relevant.
2. The trespass itself is a conversion, and no demand is necessary in trover.
3. The knowledge of defendants of the constable's right to sell the property, is immaterial.

ERROR to Platte Circuit Court.

JONES, for Plaintiff.

POINTS AND AUTHORITIES.

The plaintiff brings this cause here by writ of error, and to reverse the judgment of the court below, relies on the following points :

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1. That in trespass all are principals; and those who direct a trespass, or assent to a trespass for their benefit after it is done, are equally liable with those who actually commit it; 7 Mo. Rep. 175. The evidence, therefore, that defendants indemnified the constable, and compelled him to sell said property, after a trial of the right thereof between them and plaintiff, was improperly excluded by the court, because the evidence went to show a conversion of the property; and that defendants did not only consent to the trespass, but were in fact the principal actors.

2. That the court erred in giving the first instruction prayed by defendants, because it referred to the jury, for their determination, a question of law; 6 Mo. Rep. 267.

3. That the wrongful taking, or illegal using, or misusing the property, would render defendants liable in this form of action; 1 Chitty's Pl. 151. The court erred, therefore, in giving the third instruction on the part of defendants.

4. That if the plaintiff was the owner of the property, the sale thereof by the constable on execution against Henry Matheny, in favor of defendants, conveyed no title to defendants, even though they had no notice of the plaintiff's rights. Wright's Ohio R. p. 738. The fourth instruction on the part of the defendants, was therefore improperly given.

5. That if defendants wished to avoid the conveyance of said property to plaintiff as judgment creditors of Henry Matheny, on the ground of fraud, then they ought to have produced their judgment, and having failed to produce it, they did not show themselves in a situation to defeat the sale and conveyance of said property to plaintiff. 7 Mo. Rep. 128. The verdict is, therefore, contrary to the law and evidence.

6. That the court erred in sustaining the demurrer to the second and third counts of the declaration. (1 Chitty's Pl. 186, side paging.)

LEONARD & BAY, for defendants in error.

POINTS AND AUTHORITIES.

1. The demurrer to the second and third counts in the declaration was properly sustained, because:

First, If those counts are in trespass, there is a misjoinder of actions; Cooper vs. Bissell, 16 Johns. Rep. 146; 1 Chitty Pl. 231, 236; Keay vs. Goodwin, 16 Mass. 1; Fairfield vs. Burt, 11 Pick. 244.

Second, If the counts should be considered in case, they are bad, be-

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cause the injury complained of is direct and not consequential; Percival vs. Hickery; 18 Johns. Rep. 257; Wilson vs. Smith et al, 10 Wend. 324; 1 Chitty on Pl. 145; Leame vs. Bray, 3 East 593.

Third, The execution referred to in those counts, was a lien upon the property levied upon from the time it was placed in the officer's hands.

Fourth, These counts are uncertain, confused, and mingle together various and irrelevant matters.

2. The proceedings before the constable on the trial of the right of property, was properly excluded, because the verdict of the jury in such trials, if against the claimant, merely justifies the officer in selling the property, and does not determine the title, or ownership of the property. Justices' Courts, R. S. 1835, p. 367, sec. 14, 15, 16.

3. No exceptions were taken to any of the instructions, and the plaintiff cannot therefore complain of the action of the circuit court in relation to them.

4. The verdict was sustained by the evidence.

NAPTON, J. delivered the opinion of the court.

This was a special action on the case brought by Matheny, against the defendants in error, to recover damages for the alleged conversion of certain property described in the declaration. The first count of the declaration is trover, for the conversion of three yoke of steers and a wagon. Upon this count issue was taken and the trial had, in which the defendants obtained a verdict. The second and third counts of the plaintiff's declaration were demurred to, and the demurrer sustained.

Upon the trial, the plaintiff gave evidence, the object of which was to show, that the property alleged to have been converted by the defendants to their use, belonged to him. The property had been levied on as the property of one Henry Matheny, (the plaintiff's brother,) and had been sold under execution against said Henry, and the defendants were the purchasers at that sale, and the plaintiffs in the execution. The plaintiff offered to prove that a trial of the right of property was had between the said plaintiff and defendants, before the constable who made the levy, and that the jury returned a verdict in favor of the plaintiff, and that the defendants indemnified the constable, and compelled him to sell said property. This testimony the court rejected, and exceptions were taken. The defendants introduced evidence conducing to show that the property alleged to have been taken was the property of Henry Matheny, the defendant in this execution.

The court instructed the jury:

1. That if they believe the defendants came into possession of the

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oxen and wagon, legally under execution, they must find for the defendants.

2. If they believe that the oxen and wagon were the proceeds of H. Matheny's claim, and managed in Daniel Matheny's hands to avoid the demands of Henry's creditors, they would find for defendants.

3. Unless it was proved that defendants converted the oxen or wagon to their use by using them, or that a demand was made of them, they must find for defendants.

4. That if defendants bought under execution, they are entitled to a verdict, unless it is proved that they knew at the time of the sale, that the constable had no authority to sell.

5. That if they believed that plaintiff came into possession of the property fraudulently, &c., they must find for defendants.

These instructions were given at the instance of the defendants. The court also gave the instructions asked for by the plaintiff, which are not material to be noticed. No exception, so far as the bill of exceptions shows, was taken to the instructions; but a motion was made for a new trial, upon the ground that the court had misdirected the jury, and had excluded legal testimony, which was overruled, and exceptions taken to the overruling of this motion. The case is brought here by writ of error.

The second and third counts of the declaration are in case; reciting the judgment, execution, trial of right of property, and sale, and averring that by reason of said proceedings, said plaintiff was put to great trouble and expense, and was compelled to pay out large sums of money in employing counsel, &c. To these counts there was a demurrer, and the demurrer was sustained; and a question arises here, whether that demurrer was properly sustained. This point has not been insisted on by the plaintiff in error; nor is it very material, in the view we take of the case, that it should be decided. We have, however, looked into the authorities cited by the counsel for the defendants in error, and incline to the opinion that the demurrer was properly sustained. The cases of *Leame vs. Bray*, (3 East. 593, and *Scott vs. Shepherd*, 2 Black. R. and 3 Wils.) are the leading English cases on this subject; and though the authority of the former was questioned in *Rogers vs. Imbleton*, (2 Bos. & Pull. 117,) the distinction taken by Lord Ellenborough has not been overturned, and seems to be recognized in the American courts.—Where the injury is direct, trespass is the proper remedy; and where the injury is not direct, and immediate on the act done, but consequential only, an action on the case lies. There is a class of cases in which, though the injury is direct, yet case and trespass have been held con-

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current remedies, in consequence of the act being the result of negligence, or gross mismanagement; *Bliner vs. Campbell*, 14 John. R. 433; 1 Chitty Pl. 127; but the present case does not fall within this principle. Where the injury is not only direct, but wilful, trespass alone can be maintained.

The second point arising on the record, is the exclusion of the testimony offered by the plaintiff in relation to the trial of the right of property before the constable, the result of that trial and the tender of indemnity by the defendants. That the verdict of the jury upon this trial, was no evidence of the right of property, is quite manifest. Had the testimony been offered for this purpose, or for this purpose alone, the court would, with propriety, have excluded it. So much of the proffered testimony as related to the tender of the indemnifying bond to the constable, and requiring him to sell, notwithstanding the finding of the jury in favor of the claimant, was certainly competent, and may have been important to show the active agency of the defendants. Had the testimony in this view been merely cumulative, it would not for that reason be objectionable. The object of the testimony may have been to show that the defendants were trespassers, having previously established the right of property in the plaintiff. If so, a glance at the instructions which the court gave, will show that it is very material. The trespass was in itself a conversion of the property, sufficient to maintain the action, and no demand is in such cases necessary.

In relation to the instructions, the propriety of which is denied by the plaintiff in error, no exception was taken to them in the course of the trial; though one of the grounds in the motion for a new trial, was the misdirection of the court, and exceptions were taken to the opinion of the court in overruling that motion. In a late case decided, I believe at the last term of this court, this was held insufficient by a majority of the court, and this decision may be regarded as settling this question of practice. I did not concur in that opinion, for reasons which it would be useless to state. In accordance with that decision, the propriety of the instructions given by the circuit court in this case cannot be assigned for error; but as the judgment must be reversed, and a new trial awarded, because of the error committed in excluding pertinent testimony, it may not be improper to observe, that several of the instructions are erroneous. The first instruction refers a question of law to the jury, and is therefore only calculated to perplex and mislead. The third is erroneous, as no demand is necessary, when a trespass constitutes the conversion complained of. The fourth instruction places the

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right of recovery on the question of knowledge or ignorance on the part of the defendants, of the constable's right to sell, a matter totally foreign to the issue, in trover.

Judgment reversed and cause remanded.

ASHBY vs. WATSON.

1. The answer of a garnishee is not governed by the rules of technical pleading.
2. A garnishee in his answer stated, "that he had purchased a note of a certain date, and amount, given by defendant in execution, and assigned to the garnishee before he was summoned, and therefore, he owed the defendant in execution nothing." This will authorize the garnishee to prove that he had a bond, or any other claim against the defendant, exceeding his debt to the defendant.

ERROR to Chariton Circuit Court.

LEONARD & BAY for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The circuit court improperly excluded the bond on Thomas Watson, offered by Daniel Ashby. The matter in issue was, whether or not Daniel Ashby was, at the time he was summoned as garnishee, indebted to Thomas Watson, and the bond would have conclusively shown that Ashby owed Thomas Watson nothing, but on the contrary, that Thomas Watson was indebted to Ashby. See act of 1835, concerning "Attachment," art. 2, sect. 15, 16, 19, 20; Adm'r. of Brotherton v. Anderson, 6 Mo. Rep. p. 388.

STRINGFELLOW for Defendant in error.

POINTS AND AUTHORITIES.

1. It is contended that the answer only shows an *off set*, and if the bond could not be received to sustain a like plea of off-set, it could not be admitted here. It does not prove a *payment*, so as to disprove the indebtedness. The plaintiff in error, is bound by his answer, and can introduce no evidence but such as is authorized by the answer. The bond is not the note, set out in the answer; and the judgment was correct. Chase vs. Chase, 8 Mo. Rep. 104.

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NAPTON, J. delivered the opinion of the court.

This was a suit commenced before a justice of the peace by John Watson, against Thomas Watson, in which Daniel Ashby, the plaintiff in error, was summoned as garnishee. Judgment was rendered against Ashby before the justice, for \$129 58, from which he appealed to the circuit court. The answer of Ashby to the interrogatory touching his indebtedness was, that at the time of the service of the garnishment, he owned a note on Thomas Watson for \$151 51, due the 1st Jan., 1843, and therefore, he owed said Watson nothing. The trial before the justice took place in November, 1843, and the process had been served on Ashby the August preceding. At the trial in the circuit court, the plaintiff below, proved that Ashby was indebted to Thomas Watson, in the sum of \$129 58, but it also appeared that before the service of the process on Ashby, he had purchased of one Lisbon Applegate, a bond on said Watson for \$151 51, due the 1st January, 1843, which was proved to have been executed by Watson, at the time of its date, and to be genuine, and to have been assigned for value received to said Ashby, previous to the service of the garnishment. The court refused to permit the plaintiff in error to read said bond in evidence, and gave judgment against him for \$129 58. Exceptions were taken to the opinion of the court, a motion made for a new trial, and overruled, and the case brought to this court by writ of error.

The counsel for the defendant in error insists, that the bond was properly excluded; because, first, the garnishee in his answer, to the interrogatories, had described it as a note; and second, had it been truly described, it was only a set-off, and was therefore insufficient to disprove indebtedness.

In relation to the first point, it is sufficient to observe, that the answer of the garnishee is not governed by the rules of technical pleadings, and if it be substantially sustained, it matters not that he has failed to employ the proper legal terms. Nor does there seem to be much force in the remaining objection, for the bond was not offered as a set-off, but merely to show that Ashby was not indebted to Thomas Watson. Had a suit been instituted by Thomas Watson against Ashby, the latter it is true, could not have availed himself of this bond as a set-off, because its amount exceeded the jurisdiction of the justice, and the Legislature have thought proper to provide another tribunal before which a demand of this character must be established. But the question before the court was, whether Ashby was indebted to T. Watson, and the bond offered by Ashby, conclusively showed, (with the testimony,) that

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Watson was indebted to him. The court was not called upon to give judgment in favor of Ashby, for the balance which appeared due to him, as it would have been, had the bond been offered as a set-off, but simply to decide whether any indebtedness existed on the part of Ashby. If none existed, he was entitled to be discharged. In truth, the answer of the garnishee may be regarded as a simple negative, and the question for the court was merely as to the legality of the evidence offered to sustain this answer. Had the bond been for a sum ten times greater than it was, would it not still tend to establish the truth of the answer? The question of jurisdiction has nothing to do with it.

Judgment reversed and cause remanded.

RANKIN, BLAIR AND GANTT vs. OLIPHANT AND WIFE.

1. The assignment of dower in leasehold estates under the statute, is governed by the same rules which prevail in estates of inheritance.
2. If the husband die seized, the widow is entitled to be endowed of one third of the land at the time the dower is assigned, as well against a purchaser under a sale by order of a court as against the heir.
3. *Tout temps prist*, cannot be pleaded by a purchaser under such sale, to the petition of a widow for her dower. But she is entitled to recover damages from the death of her husband, and no demand is necessary.

ERROR to St. Louis Circuit Court.

GANTT, for Plaintiffs in error.

POINTS AND AUTHORITIES.

1. The demandants were entitled only to dower of the unimproved value of the premises.
2. That they were only entitled to damages from the time of making demand of dower, i. e. from Oct. 10th, 1843.
3. That the plea filed by defendants below, plaintiffs in error here, was good, and entitled the defendants to costs, and a judgment according to the plea.
4. That the judgment of the circuit court was erroneous, both in overruling the plea, and in giving judgment on the case stated.

Rankin, Blair and Gantt vs. Oliphant and Wife.

A. TODD, for Defendant in error.

POINTS AND AUTHORITIES.

1. Eliza Oliphant is entitled to dower in the premises. Revised Statutes, p. 228, § 1.

2. She is entitled to an assignment of her dower, with the benefit of the improvements, and of the increased value of the premises from other causes. Roper on husband and wife, p. 349 & 350-4; Kent's Com. p. 65 to 70; Mason's Rep. 347; 5 Serg. & Rawle Rep. 289; 1 Hilliard's Abr. § 14, 15, 16, on p. 71-2; and § 30 to 33, on p. 103-4; Park on Dower, 339.

3. She is entitled to damages for detention of her dower since the death of her husband. Rev. Statutes, p. 329, § 16. Park on Dower, p. 305-6. Her husband died seized, and no assignment was made within 12 months thereafter.

4. The defendants below cannot plead *tout temps prist*. Park on Dower, p. 305; Roper 436.

NAPTON, J., delivered the opinion of the court.

Oliphant and wife filed their petition in the circuit court of St. Louis county praying for an assignment of dower in certain leasehold estate in the city of St. Louis.

The petition set forth, that the said leasehold was for the term of fifty years, from the 31st January, 1834; that it formerly was the property of one Spencer, the former husband of the petitioner, Mrs. Oliphant; that said Spencer died in 1837; that the petitioner had never released her dower in said property, and that Rankin, Blair and Gantt, were in possession of the premises.

The defendants pleaded, admitting the truth of the facts alleged in the petition, but averred that at the December term, 1841, of the probate court of St. Louis county, the administrator of said Spencer's estate, by order of said court, sold said Spencer's interest in said leasehold property to Rankin, for \$5000; that the property at this time was wholly unimproved; that Rankin sold a portion to Blair and Gantt, upon which B. & G. erected buildings, and that Rankin built upon his part; that they had no notice of Mrs. Oliphant's claim until just before suit brought; that they then offered her a yearly sum equal to the value of her dower, with damages for detention since notice of her claim; that they now offer the same and bring the money into court, &c.

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To this plea there was a demurrer, which was sustained by the court, and the court gave judgment for the petitioners.

An agreement was filed in the case ; from which it appeared, that the facts stated in the plea were true, and the annual value of the premises, both when unimproved and since improved, were ascertained, and it was also agreed that the premises were incapable of subdivision.

Judgment was given that the widow be endowed with the improved value of the property, and for damages from the death of her husband. These damages were computed at the rate of one-third of the unimproved value of the premises up to the time of the completion of the improvements, and for the time since elapsed, at the rate of one-third of the unimproved value.

The defendants took a bill of exceptions, preserving all the facts, and brought this writ of error to reverse the judgment.

The principal question arising from the record is, whether the widow is entitled to one-third of the improved value, or only one-third of the unimproved value of the leasehold estate.

As the common law did not give any dower in an estate less than a freehold of an inheritance, the rights of the petitioner depend solely on the provisions of our statutes, the first section of which declares that "dower in leasehold estate for a term of twenty years, or more, shall be granted and assigned as in real estate." The term real estate, when used in other parts of the code, is declared to mean any interest in lands, tenements or hereditaments, and is sufficiently comprehensive to embrace that interest, which by the common law was regarded as a mere chattel, and was therefore termed a chattel real. This clause of the first section is therefore inartificially expressed, designing, as it most obviously does, an enlargement of the common law estate in dower, and causing it to embrace chattels real, (where the estate was for twenty years,) as well as freeholds of inheritance. The grant and the assignment of dower in this leasehold interest, is to be governed by the same principles which regulate its assignment in other cases. We will, therefore, in the investigation of the main question, consider the case as one of a descendible freehold.

It is well settled, that where the husband dies seized of lands, the wife shall be endowed of them according to their value at the time of the assignment; but that where lands have been aliened during the husband's lifetime, she shall only be entitled to one-third of their value at the time of the alienation. The reason for this distinction given by the ancient law writers, is that the heir is not bound to warrant, except according to the value of the land as it was at the time of the feoffment,

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and so the wife if she were to receive according to the improved value, would recover more against the feoffee, than he would recover in value against the heir, which would be unreasonable. (Co. Litt. Harg. lib. p. No. 163.) The rule is different where the husband dies seized, and the heir or his alienee improves the land, for it is his own folly, and the widow takes the value as it is at the time of the assignment. 2 John. R. 484; 13 J. R. 779; 6 J. C. R. 266; 11 J. R. 510; 13 J. R. 179; 4 Kent. Com. 67. The reason given for this distinction in favor of the alienee of the husband, has in several modern cases been doubted or disavowed; but the distinction itself has been uniformly maintained, as founded upon clear principles of justice, and sound views of public policy. 4 Kent. Com. 65.

The case now under consideration, is not the case of an alienation by the husband, nor is it the case of an alienation by the heir, after a decent cast. Hence the principles heretofore established, cannot be conclusive of the merits of the present question. Our statute, which makes leasehold estates dowerable, is an innovation upon the common law, and a similar innovation has not, so far as my examination has extended, been made in any other State. Consequently the decisions in England and in the United States, cannot have, except by analogy, any bearing upon the question.

On the one hand, it is contended, that the situation of the plaintiffs in error is precisely similar to that of the alienee from the husband; that the same motives of justice and principles of public policy which induced an exception in favor of the alienee of the husband, would warrant a like exception in favor of the purchasers at the judicial sale; that the statute concerning administrations, in accordance with the provisions of which this land was sold, favors this interpretation of the act concerning dower, by declaring that the deed made by the executor or administrator, shall convey "all the right, title and interest, which the husband had at the time of his death, free from his debts," &c.; that consequently this judicial sale relates back to the period of the testator's death, and the purchaser takes his title, as it were, from the testator himself; and that in this case especially, which is only a leasehold interest, as no descent is cast upon the heir, the purchaser may, with the greater propriety, be viewed as a *quasi* alienee of the husband.

On the other hand, it is insisted that the title of the wife to her dower is vested by the death of the husband, and that the sale by the administrator, either of an inheritable freehold or a leasehold for twenty years, as it cannot defeat the wife's dower, can neither place

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the purchaser in a more eligible position than the heir or administrator.

The question is certainly not without its difficulties. These difficulties, however, so far as the present branch of the subject is concerned, arise from the failure of the legislature in providing the details by which the general provision, embracing leasehold interests, was to be enforced, or in conforming the subsequent provisions of the act to this change. The legislature have declared that leasehold interests of a specified character shall be dowable, and have also provided for the sale of such interests, as well as every other real estate of a deceased person, for the payment of his debts, subject to the widow's dower. Further than this the statute is silent. The 16th section of the dower law, it is true, enacts, that where a widow is entitled to dower in real estate, and cannot have it without suit, or is deforced of her dower, or it is unfairly assigned, or not assigned within twelve months from the husband's death, she may sue for, and recover the same with damages. The section then specifies the extent of the damages, which is the value of her dower from her husband's death, if he died seized, or from demand, where he did not die seized. This is, in substance, the statute of Merton. This provision no way illustrates the question at bar, except that it conclusively establishes the position we assumed at the outset, that terms, for years, were embraced in the term "real estate," and the word *seizen* is designed to apply to such interests, as well as to estates of inheritance. There is no other provision giving damages in the act; and after declaring in the first section that leaseholds for twenty years were to be dowable as estates of inheritance, they are described and included in the general phrases peculiarly and appropriately adapted to freeholds in every subsequent clause of the statute. There can be no impropriety, then, in treating the question at bar, as though the interest of Mrs. Oliphant was a freehold, for it is obvious that whatever rule be adopted as to one, must prevail in both species of estates.

If we recur to the reasons for exception in favor of the husband's alienee, the most striking and forcible one given in favor of the rule, is the uncertain, contingent and defeasible interest of the wife at the time of the alienation. One of the three incidents to the estate in dower, the death of the husband, is wanting. The estate is yet inchoate, and may never become a vested interest, for the husband may outlive the wife. To encourage, therefore, the improvement of lands so situated, it was thought politic to limit the dower of the widow to one-third of their value at the time of the alienation. Not so where the husband

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dies seized; the right of the dowress is then fixed, and though the descent is cast upon the heir, until an assignment is made, the widow, so soon as she has her dower assigned, does not hold of the heir, but is in, from the death of the husband. The heir therefore, when the ancestor dies seized, in making improvements upon the estate, does so with a full knowledge of a vested and indefeasible estate in the widow, and is in the situation of any other person building on land which he knows to belong to another. So the alienee of the land stands in no better predicament than his alienor. Another consideration which doubtless had its influence in exempting the alienee of the husband from any responsibility for an increased value of the lands, arising from the expenditure of his money or labor, was the length of time which in many such cases would elapse before the consummation of the title. No such considerations operate in favor of the heir, or, we may add, the executor, for by the common law the heir or terre-tenant, and by our statute the executor, or the creditors of the deceased, could at any time cause an allotment of dower to be made.

Supposing the estate of Mrs. Oliphant to be an estate of inheritance, what was its condition on the death of her husband? By the common law it descended to the heir; and in the case of Mackay's admr. vs. Burdine, notwithstanding an ingenious argument was drawn from our administration act, to show that the common law had, in this respect, been altered, and that lands in this State vested in the administrator or executor, this court held that the descent was still under our statute cast upon the heir. True, it descends, subject to the payment of debts, and subject to the widow's dower. When the dower is ascertained and set off, the widow is in from the death of her husband; and so the purchaser of real estate, sold by the administrator to pay the intestate's debts, takes the title as it stood at the death of the intestate. Either event defeats the title and estate of the heir, but until either event takes place, the heir has the title.

So far, then, as the heir is concerned, where the estate is in freehold of inheritance, we have seen that the question now under consideration has been settled. In what respect, then, would the purchaser at a judicial sale be in a more favorable position than a purchaser from the heir? There is no pretence that such a sale could divest the widow's right of dower, and the purchaser is presumed to be cognizant of the law in this respect. The right of the widow has become vested and fixed by the death of the husband, as much so, when the land is sold by the order of the county court, as when it is alienated by the heir, and it is difficult to see any principle of law which would operate upon

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the alienee of the heir, which would not apply with equal force to the purchaser at sale.

The character of Mrs. Oliphant's estate, as we have observed, will not affect the merits of the title. Her husband's term was but a chattel interest, and did not descend to the heir, but passed to the administrator. But so far as the power of the administrator is concerned, there is no distinction in our law between estates of inheritance, and chattels real. They are both liable for the debts of the ancestor, and both can be sold on the application of the personal representative, for the payment of debts. The statute which makes terms for years dowerable, must be understood as placing them in all respects, upon a footing with descendible freeholds. It is impossible to make one rule for them, and another for the estates of inheritance, in relation to the rights and remedies for the dowress. "Dower in leasehold estate," says the act, for a term of twenty years or more, "shall be granted and assigned as in real estate." Whatever rule, therefore, shall be applied to the assignment of dower in real estates, (or rather estates of inheritance,) shall be applied to leasehold interests. They are *pro hac vice* declared estates of freehold.

If it were a descendible freehold, could there be any doubt about Mrs. Oliphant's right to one-third of the land at the time of the assignment? The argument designed to bring the plaintiffs in error, within the exception of the general rule of law, made for the benefit of alienees of the husband, proves too much. If a sense of justice pleads strongly in favor of the plaintiffs in error, as purchasers at a judicial sale, it would only show that no dower at all existed in the lands so sold. But it is admitted that the right of dower was not extinguished by the sale. It is conceded that the general principle of law gives the dowress one-third of the land at the time of the assignment, and that an exception to that rule has been made heretofore, in one case only—the case of the husband's alienee. It would seem more appropriately to devolve upon the legislature, if other exceptions are desired, or thought necessary, to declare so by statute. The law as it now stands, does not warrant the courts in making such a rule.

The remaining branch of this inquiry relates to the damages. The statute of Merton allows the widow damages when the husband died seized, from his death; and our act contains the same provision. But the uniform construction given to that statute, has been that the damages are computed from the time of the demand upon the heir, and hence the plea of *tout temps pris* has been allowed the heir. 1 Th. Co. Litt. 586, 326; 4 Kent's Com. 464. Lord Coke says, the reason why

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tout temps pris is a good plea in a suit of dower against the heir is, because the heir holdeth by title, and doth no wrong until a demand is made; but he is further of opinion, that the alienee of the heir cannot plead this plea, because he had not the land all the time from the death of the ancestor, and could with no truth say that he had been always ready to assign the widow her dower. The widow was so far favored as to be put to only one suit to recover her damages, and the alienee of the heir was left to his recourse upon the heir, for such damages as he was compelled to pay during the tenancy of the heir. Our statute provides, that the suit for dower may be instituted against any person claiming any interest in such lands, or being in possession thereof, or who shall deforce her of her dower therein. By the common law, only one who would be a good tenant to the precipe, could be made defendant. It is not perceived how this difference can affect the rights of the dowress to the damages given her by the statute. Our statute is express, that damages shall be awarded, from the death of the husband, wherever the husband has died seized; and if we adopt the construction given to the statute of Merton, allowing the heir to plead *tout temps pris* there seems to be no reason why the limitation which excluded the alienee of the heir from the benefit of such a plea, should not be applied to such terre-tenants as may be made defendants under our laws. The same reason which was given for denying this plea to the alienee of the heir, applies to the present defendants.

Judgment affirmed.

TOMPKINS, J., dissenting.

 ROBINETT vs. NUNN.

1. When a set-off is filed before a justice of the peace, which exceeds the jurisdiction of the justice, he should treat it as a nullity. And on an appeal to the circuit court, such set-off cannot on motion, be reduced by a credit, so as to be in the jurisdiction of a justice, but the court will regard it as though no set-off had been filed before the justice.
2. A set-off may be pleaded before a justice after judgment by default is set aside, if before a trial is had.

APPEAL from Green Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was a suit originally commenced before a justice of the peace

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in Wright county, by Nunn against Robinett, on a note for \$100, given by said Robinett and one Mott, payable to one McDowell, and assigned by McDowell to plaintiff. On the return day of the writ, judgment by default was entered against Robinett. Two days after, this judgment was set aside on the application of the defendant, and the cause was set for trial on the 12th February, 1843, the previous trial having been on the 14th January. At the request of the defendant, the cause was adjourned until the 8th April, and on that day again postponed by consent of parties, till the 20th May. On this last day the defendant filed an account against McDowell, for \$107 50, the parties went to trial and a verdict was rendered in favor of the plaintiff for \$120 50, and a judgment given accordingly, from which Robinett appealed to the circuit court.

The appellant in the circuit court, upon a petition setting forth his belief in the prejudice of the judge, procured a change of venue, to the Green circuit court, where a trial was accordingly had, at the October term, 1844. At that trial the defendant moved the court to reverse the judgment of the justice, and remand the papers, which motion was overruled. The plaintiff then moved to strike out the set-off filed in the cause, because its amount exceeded the jurisdiction of a justice of the peace, and because it had been filed improperly. At the same time the defendant filed his motion for leave to remit a portion of the set off, so as to reduce the same to ninety dollars; which last motion the court overruled and sustained the motion to strike out. Verdict and judgment for the plaintiff. A motion was made for a new trial, which was overruled, and exceptions duly taken to the opinions of the court.

The errors relied on to reverse this judgment, are based upon the action of the circuit court upon the two motions submitted at the trial. The motion of the defendant below to reverse the judgment of the justice, and remand the papers to the justice, seems to have been founded upon the supposed illegality in the adjournments of the trial by the justice, growing out of the passage of the act of January 16, 1843, which restricted the sessions of justices' courts to quarterly sessions. There seems to be nothing in this law, which deprives the justice of the powers conferred by previous laws, of adjourning cases, either by consent of both parties, or on the application of either, or in his own discretion. Rev. Code '35, p. 355. However this may be, it was clearly the duty of the circuit court, when the cause came up by appeal, to proceed to try the cause without regard to any irregularities the justice may have committed. There was, therefore, no error in refusing to remand the papers.

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As to the set off, the objections to it are two-fold ; first, that it was not filed in time, but after a judgment by default ; and second that it exceeded in amount the jurisdiction of the justice. When the judgment by default had been set aside, the case stood as though no judgment had ever been rendered ; and the defendant having filed his set-off before trial, it was properly before the justice, if unobjectionable in other respects. But it exceeded the sum over which the justices have jurisdiction ; and the statute expressly says, that when that is the case the set-off shall not be allowed. There can be no question, but that the plaintiff might have waived a portion of his demand, so as to bring it within the jurisdiction of the justice. But he did not offer to do this before the justice, and the set-off was therefore properly disregarded by the justice. When the cause came into the circuit court, it was as though no set off had been filed before the justice, and in such cases, the statute prohibits their introduction into the circuit court.

Judgment affirmed.

JULY TERM, 1845.

JONES vs. HUNTINGTON.

Jones, the complainant, had a judgment against one Hamilton. Myers was indebted to Hamilton, and one Huntington to Myers.

A court of chancery has no power to compel Huntington to pay the debt of Hamilton.

ERROR to Platte.

JONES, *per se.*

POINTS AND AUTHORITIES.

1. That complainant is without remedy at law.
2. The jurisdiction of a court of chancery, in Missouri, extends to all cases in which adequate relief cannot be had in the ordinary course of proceeding at law. (Rev. S. Mo. 506.)
3. That a court of equity has jurisdiction where there is a clear right, and there is no remedy in a court of law, or the remedy is not plain, adequate and complete, and adapted to the particular exigency. (Story's Equity Pl. 374, 372; 1 Story Equity Jurisprudence 32; 1 Bl. Com. 42.)
4. That a judgment creditor who has taken out execution, without satisfaction, may confiscate a debt due his debtor in chancery. (Wright's Ohio Rep. 245, 267; 3 Marshall Rep. 69; 2 Marshall Rep. 301; 2 Johnson Chy. Rep. 295; 1 Am. Chy. Digest 159, 160.)

Scott, J., delivered the opinion of the court.

This was a bill in chancery, filed by the complainant Jones, under the following circumstances: Jones recovered a judgment against Hamilton, on which an execution was issued, and returned *nulla bona*.

Jones vs. Huntington.

Samuel T. Myers, of the State of Illinois, was indebted to Hamilton. John Huntington, of Platte county, in this State, was indebted to Myers. The bill seeks to attach the debt due by Huntington to Myers in satisfaction of the debt of the complainant Jones, on the ground that Myers is a non-resident, and indebted to Hamilton, the defendant in the execution. On a demurrer the bill was dismissed, and from the decree of dismissal, the complainant appealed.

It is hard to imagine a ground on which this proceeding can be sustained. Myers being a non-resident, and having nothing here on which the jurisdiction of a court of equity could attach, was improperly made a party, and under such circumstances no court would have been warranted in rendering a decree against him. Such a decree would have been null and void. The objection however arising from the fact of his non-residence has been obviated by his appearing in court, and entering a demurrer to the bill. He can no longer insist that the courts of this State have no jurisdiction of his person. But although he has given the complainant this advantage, on what principle can he support his proceeding? The case in the bill would go a bow-shot further than any yet has gone. A debtor of the defendant in the execution has, under some circumstances, been made to pay his debt to the plaintiff, but by this bill the plaintiff in an execution seeks to recover his debt from one who is indebted to the debtor of the defendant. Into what an embarrassing and complicated investigation would this lead the courts? It would necessarily require the adjustment of two controversies in one suit, and lead to an improper joinder of actions, or as it is called in courts of equity, to multifariousness. Our statute made a great stride when it authorized the attachment of debts due to the defendant in an execution, a stride whose justification can only be found in the great relaxation of the salutary rigor of our former laws relative to the collection of debts.

In the case of Egberts vs. Pemberton, 7th John. Ch. Rep. 210, Chancellor Kent, speaking of the former cases relative to the attachment of the debts due to a judgment debtor, remarked, that they only applied to property held in trust for the debtor, and they did not authorize any general interference with the debts due to the debtor. But when there is a specific judgment debt due to the debtor, and he has no property which can be reached by *fi. fa.* at law, it seems to be within the principle and equity of the cases, that the judgment creditor should be enabled by the aid of a court of chancery, to attach that debt. To help the judgment creditor so far as to secure to him the appropriation of a judgment debt due to his debtor, is perfectly reason-

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able, and leads to no embarrassing investigation of the business and dealings between debtor and those indebted to him. A judgment debt is a liquidated demand, reduced to a certainty, and it may without any great stretch of presumption, be considered as so much money held in trust.

From this it will be seen that our statute respecting the attachment of debts on execution has gone further than courts of equity in giving relief to judgment creditors. Whether our courts of equity when applied to, would confine their relief to cases in which it was given before the statute, or whether they would to the extent of the statute, it is not necessary now to determine. It seems clear that no court should go the length desired by the complainant without expressed legislative enactment, seeing the difficulties and embarrassments with which the proceeding would be encumbered.

The argument that a court of equity has jurisdiction, because otherwise the complainant would be without a remedy, is totally misapplied when used in support of this procedure. It is begging of the question, to say, that the complainant has right against the debtor of Myers. The effect of the argument is, that a creditor may, in a court of equity, compel a third person to pay his debt, because his debtor is unable to do it.

The other judges concurring, the decree will be affirmed.

Decree affirmed.

TURNER vs. NORTHCUT & McCARTY.

When an appeal is taken from the judgment of a Justice of the Peace, the plaintiff may, in the circuit court, dismiss his suit. The cause then stands as if no judgment had been rendered.

APPEAL from Boone.

TURNER & GORDON, for the Appellant.

The appellant relies upon the following

POINTS AND AUTHORITIES.

1. The record and proceedings in the case of Turner vs. McCarty, were illegal and irrelevant as evidence in the cause.

There never was a final trial and judgment upon the merits of the

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cause. The appeal being properly taken from the justice's judgment, and the original papers being filed in the circuit court, divested the justice's judgment of *all legal effect*, and the circuit court was possessed of the cause, and was bound to hear, try and determine the cause anew. See Revision 1835, title, Justice's Courts, art 8; 5 & 8 secs.

The circuit court, upon appeal, is bound to give a judgment of its own. See 5 Mo. Reports, 124.

The circuit court did not hear, try and determine the cause, but on the plaintiff's motion dismissed *his suit*. See the judgment.

The dismissal of the suit leaves the plaintiff precisely in the same situation, except as to costs, as before suit brought.

The dismissal of an appeal, leaves the judgment of the justice in force. Because, 1st, the appeal was illegally taken, and in law *no appeal*; 2d, the appeal dismissed by the court for want of prosecution, and 3d, by consent of the parties.

II. Because, the articles in the plaintiff's account were all delivered to the defendant *in payment of a demand* held on one of the plaintiffs, long prior to the suit of Turner vs. McCarty. The last items in the account were dated July 7th, 1842. The suit of Turner vs. McCarty was commenced 5th Septembr, 1843.

If the articles were delivered to Turner in payment of his demand, prior to the judgment in the case of Turner vs. McCarty, the plaintiff's could not recover the value of the articles in the suit. "A voluntary payment made by a party with a knowledge of the circumstances of the case, he cannot recover it back again, because of his ignorance of the law." The following authorities lay down this principle: Brisbane vs. Dacres, 7 Taunton 144; also reported in 1 English Com. Law Reports, 43; Belbie vs. Lumsby, 2 East, 469; Morris vs Jarvis, 1 Dallas, 148; Bogart vs. Evans, 6 Sergt. and Rawl. 369; Irvine vs. Hanlow, 10 Sergt. & Rawl. 219; Wait vs. Leggett, 8 Cowen Rep. 195; Clark vs. Dutcher, 9 Cowen, 674; Loring vs. Mansfield, 17 Mass. Rep. 349; 2 Marshall's Rep. 328.

If the plaintiff's cannot recover the value of the articles in the account, because they were voluntarily delivered in payment of a debt, or supposed debt, then it follows that the judgment, &c., had in the case of Turner vs. McCarty for that supposed debt, is irrelevant and illegal evidence in this cause.

III. But if the record and proceedings in the case of Turner vs. McCarty, were legal and relevant evidence, and the judgment a bar to Turner's recovery upon his claim by another suit, yet it is no bar or estoppel to the defence of payment in this suit.

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1st. Because the payment of the articles in the account was prior in time to the institution of the suit by Turner vs. McCarty.

2d. Because the payment was a voluntary one, and a suit cannot be sustained to recover the value back again. See authorities referred to in 2d point above.

IV. The finding of the court ought to have been in favor of the defendant.

1st. Because the articles in the account were proven to have been delivered in payment of a demand held by Turner vs. McCarty. This fact is proved by the evidence in the cause beyond all doubt. See Turner and Hickman's evidence. And if delivered in payment of a debt or supposed liability, the value of them could not be recovered in this suit. See authorities referred to in 2d point.

V. The payment of the articles by McCarty to Turner, was not a voluntary payment without consideration, but was for and in discharge of a prior, legal subsisting obligation of Turner against McCarty. See the written contract between Turner and McCarty, and the acknowledgment of Turner, (which was to be received as evidence.) "That the obligation was given to induce Turner to vigilance in making the money out of Northcut, and to save McCarty's interest in the land and mills—that Northcut paid off the judgment, and the interest of McCarty in the land and mills was not sold under Keith's and Glenn's judgment.

W. A. ROBARDS, for Appellees.

POINTS.

The judgment of the court below should be affirmed.

1. Because it was warranted by the evidence, and law of the case.

2. Turner's bond could not be used as a set-off in this case; first, because it is the individual bond of McCarty; 2d, because the bill of exceptions shows that he instituted suit upon it before J. W. Hickam, a trial had by a jury, a verdict and judgment rendered against him, which judgment stands in full force, and is a bar to any other suit upon it.

3. The bill of exceptions shows that Turner instituted suit upon the bond offered as a set-off, and a trial was had and a judgment rendered against him; he took an appeal, and before a trial was had in the circuit court, *he dismissed his appeal*. By dismissing his own appeal he can-

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not render void a judgment against him. The policy of the law will not permit an unsuccessful plaintiff to take an appeal from the judgment of a justice, then dismiss his appeal—make the judgment before the justice a nullity, and commence a second, third or fourth suit upon the same subject matter.

4. The court did right in excluding from its consideration the bond of McCarty (offered as a set-off,) and all evidence in reference to it, because the judgment rendered before J. W. Hickam, is regular and not reversed. (Bill of exceptions.)

Scott, J. delivered the opinion of the court.

Northcut and McCarty brought an action against Turner in a justice's court, on an account for plank, lumber, &c. After a trial in the justice's court, the cause was taken by appeal to the circuit court, where on a trial *de novo*, Turner admitted that he had received the articles charged against him, but maintained that they were delivered to him in satisfaction of a bond he held on McCarty, one of the plaintiff's in this suit. To counteract this defence, the plaintiffs produced in evidence the record of a suit commenced by Turner against McCarty in a justice's court, on a bond mentioned, from which it appeared that, in that suit a judgment had been rendered against Turner, from which he appealed to the circuit court, and after the appeal had been regularly taken, he voluntarily discontinued his action. The court permitted this evidence to go to the jury, and a verdict and judgment was rendered for the plaintiffs, from which Turner has taken this appeal.

The question involved in the cause is, whether a plaintiff who sues in a justice's court, and has a judgment rendered against him, from which he appeals to the circuit court, and afterwards voluntarily discontinues his action or takes a non-suit, is barred by the judgment of non-suit or discontinuance, or whether he may sue again on his cause of action?

This is a question on which but little light can be thrown by reference to the learning, respecting the effect of appeals and writs of error in courts of equity and law. It is clear that a writ of error at the common law, or an appeal in the civil law, did not destroy, but merely suspended the effect of a judgment or decree. In investigating the point we can only be guided by the character of the court whose proceedings are involved, and the statute regulating the subject. No principle is clearer than that a judgment of a court, however limited its jurisdic-

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tion may be, is binding and conclusive, until it is regularly vacated or set aside. Unless the judgment of a justice is appealed from, it is as binding and conclusive as the judgment or decree of the highest court known to the law. But while an appeal or writ of error merely suspends the effect of a judgment of a court of record, our legislature has not seen proper so to limit the effect of an appeal from a justice's court to the circuit court. The proceedings in a justice's court are summary, with little or no attention to forms, and they are held by officers who are not presumed to be skilled in the law. A justice is bound to enter the verdict of a jury, and give effect to it, whatever his opinion may be of its injustice and oppression. On the trial of an appeal from a justice's court in the circuit court, no regard is had to the evidence which was produced in the inferior court. Evidence not offered, or even purposely withheld in the inferior court, may be produced on the trial in the circuit court. The 8th section of the 8th article of the act regulating justice's courts, enacts, "that upon the return of the justice being filed in the clerk's office, the court shall be possessed of the cause and shall proceed to hear, try and determine the same anew, without regarding any error, defect or other imperfection in the proceedings of the justice. The proceedings of the justice are only looked into, in order to ascertain that the same cause is tried in the circuit court, that was tried in the justice's. If it be said that it is unjust that a plaintiff should have the effect of a reversal, simply by taking an appeal, and then discontinuing his action, it may be answered that our law gives the plaintiff a similar advantage in all other courts. A plaintiff may institute a suit against a defendant—there may be a full investigation of the controversy on the merits, and all may as well be assured as they can be of a moral certainty, that the defendant will obtain a verdict, and yet the plaintiff may take a non-suit, at any time before the cause is finally submitted to the jury, prevent a judgment in behalf of the defendant, and commence his action anew. So a plaintiff, seeing that a defendant is about to obtain a judgment against him, under a plea of set-off, may prevent it by taking a non-suit. When an appeal is taken by either party, its effect is not only to suspend, but to destroy the effect of a judgment of a justice; it makes it as though no judgment had been rendered. The cause is considered as still pending, no regard is had to the judgment of a justice, and the rights of the parties are the same as they would be in any other suit pending in the courts of record.

The plaintiff may at any time discontinue his action, or take a non-suit without prejudice to another action, and if the defendant should die and the cause of action did not survive, although he may have appealed,

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the suit would abate. I have always understood the law to be, that on the trial of an appeal from a justice's court, the plaintiff might take a non-suit, and commence another action for the same cause.

What is the difference in principle between suffering a non-suit and discontinuing an action? Upon an examination I have found that the courts of North Carolina have maintained the doctrine contended for in this opinion, whilst the courts of Pennsylvania would seem to maintain a contrary one. But this is a question depending so much on the peculiar system of laws in each State, regulating justices' courts, that the manner of its determination in them, must be an unsafe guide for the courts of this State, especially without the statutes on which the opinions are founded.

We do not consider that the record raises the question whether the joint action can be set off by the bond of one of the plaintiffs. On this question there can be no doubt.

The other judges concurring, the judgment below is reversed.

GIBSON vs. MOZIER.

1. "Not guilty," is under our statute, the general issue in an action of replevin.
2. Under that plea, evidence is admissible, to shew that the plaintiff is not entitled to the possession of the property replevied; and that a deed under which the property is claimed, is void.

APPEAL from Newton.

WINSTON, for Appellant.

THE POINTS AND AUTHORITIES relied upon by the appellant are :

1. That the plea which was by the court stricken out, was a good plea. See Revised Code, 521.

But even admitting the plea to be bad, it should have been objected to by demurrer, and the court ought not to have permitted the plaintiff to withdraw his general replication, and take any advantage of it by motion.

3. The court ought to have permitted the defendant to prove that he took the negro by virtue of an execution directed to him as sheriff, as

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the statute expressly declares that no replevin shall be sustained against any officer for any property taken by him under the authority of any legal process; and this I contend could be given in evidence under the plea of not guilty. See as to this Revised Code, 528. At any rate, I insist that the defendant ought to have been permitted to prove the fraudulent sale of the negro from Wallace to the plaintiff, as by that means he would have established that the negro was liable to the execution, and so that there was no wrongful taking.

PHELPS, for Appellee.

POINTS AND AUTHORITIES.

1. The declaration is sufficient; it avers the taking and detaining the goods of pl'ff. by the def't. 3 Mo. Rep. 331.
2. The court did not err in refusing to receive the evidence offered by defendant below. Statute 528; 1 Ch. Pl. 188—441, 6 Com. Dig. 496-7; 4 Mo. Rep. 101.
3. *Non cepit* is the general issue, and defendant as sheriff, might have given the special matter in evidence under that plea; and not under the plea of not guilty; 1 Ch. Pl. 188.

Scott, J., delivered the opinion of the Court.

This was an action of replevin for a slave, brought against Gibson, the sheriff of Newton county, who levied on the said slave as the property of one Wallace, to satisfy an execution he had against him.

Mozier, the appellee, claimed the slave under a bill of sale from Wallace.

The plea was not guilty, on which issue was joined, under which Gibson, the sheriff, offered to show in evidence that the sale by Wallace to Mozier was fraudulent and void against creditors. This evidence was excluded by the court, and there was a verdict and judgment for Mozier.

The only question is, whether the evidence under the issue in the cause was properly excluded.

Non cepit was at common law the general issue, in an action of replevin, which put in issue not only the taking, but the taking in the place alleged in the declaration. It is also true, that under the general issue *non cepit*, the defendant could not dispute the plaintiff's prop-

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erty. This could only be done under a special plea. Chitty 160, 491. Did the question look to the common law alone for its determination, there could be no difficulty in settling it. But our statute has changed the form of pleadings in the action of replevin, and removing the doubts which existed previously as to the extent of that remedy at the common law, has made its application more usual. The 7th section of the act regulating the action of replevin, enacts that the defendant may plead that he is not guilty of the premises charged against him, and this plea shall put in issue, not only the right of the plaintiff to the possession of the property mentioned in the declaration, but also the wrongful taking and detention thereof. If the right of possession to the property in controversy is put in issue by the plea of not guilty, it is hard to imagine a reason why evidence conducing to show that a deed under which a party claimed is void, is not admissible under that issue, as it clearly shows that the party claiming under it had not a right to the possession.

The view taken of this matter below seems to have been confined to that arising from the 27th section of the third art. of the Act regulating the practice at law, which allows any officer against whom an action is brought for any act done by virtue of his office, to plead the general issue and give the special matter in evidence under it; and it was argued that as *non cepit* was the general issue in an action of replevin at the common law, therefore the plea of not guilty, filed in this cause, not being the general issue, the evidence offered by Gibson, under it, was inadmissible. Whatever the common law on this subject was, we think that under our statute, there can be no pretence for contending that the plea of *non cepit*, is the general issue. Why should *non cepit* be regarded as the general issue when all that could have been given in evidence under it at common law, and a great deal more, can now be given, under the plea of not guilty? Such a view of the subject stands on a narrow and technical ground, and seems entirely at variance with the provisions of our statute on this subject.

The other Judges concurring, the judgment below will be reversed.

BOWER vs. HIGBEE, ET AL.

1. A party claiming a pre-emption right under the act of Congress of 1st June, 1840, can not maintain an action of replevin for timber cut on the land, before his right is proved.
2. A lease for 99 years, of land to which the lessor is only entitled to a right of pre-emption is void under that act.

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APPEAL from Platte.

S. L. LEONARD, for the Appellant.

The appellant relies upon the following

POINTS AND AUTHORITIES.

1. Whenever timber is severed from the soil, it becomes personalty, and is a proper subject for the action of replevin, (see *Cresson and others vs. Stout*, 17 Johns. Rep. 116,) and more especially under our statute which gives the action for detention merely.

2. A trespasser acquires no property, either general or special, to timber by cutting it. See *Turley vs. Tucker*, 6 Mo. Rep. 583; *Ranson vs. Benton*, Ib. 592. If, then, timber severed from the realty, may be subject of replevin, and the trespasser (as appellee in this case was) obtains no property by his trespasses, either the landlord or the tenant must be entitled to maintain the action. And

3. The tenant is the proper person to bring the action—see 4 Kent, 77—and especially is such the fact, when the tenant is clothed with privileges so large as in this case.

4. The plaintiff was in possession—for having a right to the possession of the whole, and being in the cultivation and possession of a *field* thereon, he is constructively in possession of the whole, except the enclosures actually occupied by defendant.

5. The validity of the lease cannot be enquired into in this collateral proceeding, it being, if invalid, voidable not void.

6. It is immaterial whether plaintiff offered legal testimony of the entry of the land by Eiler, for the acts complained of were committed long before the pre-emption right ceased, if never proved; and indeed before the land office was opened, or it was possible to have proved, Eiler's right. And if the right to maintain the action was good when the suit was instituted, that is sufficient.

HICKMAN & JONES for Appellees.

POINTS AND AUTHORITIES.

The appellees rely on the following, in support of the judgment of the court below :

1. That replevin will not lie for timber severed from land by a per-

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son in possession, claiming title to the land from which the timber is severed, (8 Cow. Rep. 220; 4 Cow. Rep. 338; 2 N. Y. Digest 238.)

2. That the 99 year lease from Eiler to appellant, is void; because it contravenes the spirit, policy and letter of the pre-emption law of 22d June, 1838, (3 Am. Com. Law 365-6; 4 Halst. N. J. Rep. 352; 2 Johns. Rep. 386; 12 John. Rep. 306; 19 John. Rep. 311; 7 Ohio Rep. 77-8; 4 Johns. Rep. 413; 3 Caine's Rep. 213.

6. The court properly rejected the evidence offered by appellant as to the entry of the land by Eiler, the certificate of entry being the best evidence.

4. The pre-emption right of said Eiler to said land, was forfeited by his neglecting to enter the same at the land office, prior to the land sales, (see pre-emption laws of 22d June, 1838.)

5. That the declaration is substantially defective—there not being a sufficient affidavit to support the same. Revised Statutes Mo. 527, sec. 1 and 3.

SCOTT, J., delivered the opinion of the court.

Jacob Eiler was entitled to a right of pre-emption to a qr. sect. of land in Platte county, under the act of Congress 1st June, 1840. In the spring of 1841, he leased the qr. sect. land to which he had a pre-emption right, to the plaintiff Bowers, for ninety-nine years. In the year 1842, the defendants, Higbee and others, made rails on the tract of land leased to Bower, and took them away. Bower, the lessee and plaintiff, brought an action of replevin to recover the rails, in which he submitted to a non-suit, in consequence of instructions given and refused by the court, and a motion being filed to set aside the non-suit which was overruled, he appealed to this court. Eiler did not prove his right to a pre-emption until some considerable time after the rails were made and removed. An act of Congress renders void all transfers of a right of pre-emption made before the issuance of a patent.

The question arising on this state of facts, is, whether the plaintiff can maintain an action of replevin for rails made on the land subject to the right of pre-emption.

Admitting the lease to Bower to be valid, and that it substituted him to all the rights of Eiler, yet can he maintain this action. What is a pre-emption right? Is it any interest in the land? Is it certain that the party entitled to it, will ever avail himself of it? Until he does, there is certainly no surety that he ever will acquire any right. What

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if a person entitled to a right of pre-emption should die before proof of his right, will it descend? A pre-emption is nothing but an offer by the government to an individual settled upon the public lands, which he may or may not accept. The circumstance that the period has not arrived when the acceptance can be signified, makes no difference. That he will accept may be presumed, but still an absolute certainty that he will accept, when the time for acceptance comes, will not confer any right, until an acceptance is actually signified in the manner prescribed by law. Timber cut upon land belongs to the tenant in fee simple, a tenant for life even has no right to it. On what principle is a pre-emption claimant entitled to it? But for our statute no right of action would be in a pre-emption claimant. That statute has given an action of trespass, and his remedy on principle would seem to be confined to the words of the statute. Ejectment 237, sec. 27. If one individual bound himself to another, that until the expiration of a limited time, the latter should have the right of purchasing his land at a stated price, would he to whom this obligation is made, acquire any right to the land, until he had actually accepted the offer? Upon an investigation it has been ascertained that similar views with respect to the nature of a right of pre-emption to the public lands of the United States, have been entertained by the courts of other States, in which the land laws of the federal government prevail. *Davenport vs. Farrar*, 1 Scammon Rep. 314; *Quails* 4 Blackford 286.

I have no doubt about the invalidity of the lease. So bold a contrivance to evade the law ought not to be countenanced, and to enter into an argument to show its invalidity, would be treating it with a dignity of which it is altogether unworthy.

The other judges concurring, the judgment is affirmed.

Judgment affirmed.

WIGGINS vs. ADM'R. OF LAWSON LOVERING.

1. The limitation of three years, does not apply to demands against an estate, unless the executor or administrator give notice of the grant of letters of administration as required by law.
2. A plea of the statute of limitations made by an executor or administrator, must aver the giving notice of the grant of such letters. And such notice must be proved on the trial.
3. An administrator is not bound to plead the general statute of limitations, but is bound to plead the statute specially applying to suits against him in his official character.

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ERROR to St. Charles.

LEONARD & BAY, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The executrix not having given notice to creditors as required by the 25th section of the act concerning "Administration," Rev. Laws 1835, p. 101—the defendant, as administrator *de bonis non*, cannot set up the limitation of three years in bar of the plaintiff's demand. *Emerson vs. Thompson*, 16 Mass. 431; *McLin vs. McNamarin*, 2 Dev. & Batt. 85; *Pendleton vs. Phelps*, 4 Day 476.

2. That before the defendant could, as such administrator, avail himself of the bar of three years, it was incumbent on him to show that notice had been duly published as required by the administration law; or that the plaintiff had either actual or constructive notice of the granting of letters testamentary to said Barbara Lovering.

3. That the plaintiff having no notice of the granting of letters testamentary to said Barbara Lovering, either actual or constructive, it would be a fraud upon his rights to permit the defendant to set up the limitation act in bar of his claim. It is a principle well settled that a party shall not be precluded by a proceeding affecting his rights, when he has had no notice of such proceeding.

4. That the property devised in the will of Lawson Lovering to Barbara Lovering, is expressly charged with the payment of his debts, and that as executrix and devisee, she held said property subject to the payment of such debts. *Jones vs. Earl of Sandford*, 3 Pierre W. 83; *Shallcross vs. Finden*, 3 Vesey 737; *Rosevelt vs. Mark*, 6 J. C. R. 294; 1 Russ & Mylne, 255, *Jones vs. Scott*.

5. That the letters testamentary were granted to said Barbara Lovering in violation of the express provision of the administration act, requiring bond with security to be given by all executors, &c. She having given no such bond. This provision of the administration law is intended for the benefit and security of creditors, as well as of the heirs, legatees and devisees, and cannot be dispensed with by the testator.

WM. M. CAMPBELL, for Defendant in error.

POINTS.

1. The statute requiring an administrator or executor to give notice

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to creditors of the existence and date of their letters, is a useful directory statute, but does not in any manner affect the length of time allowed by law to creditors for the exhibition of their demands against the estate, nor does the failure to give that notice repeal or nullify the statute of limitations against such demands.

2. The fact of property having been devised by will to the executrix, in trust to pay the debts of the estate, might possibly be used with propriety in a private suit against the trustees, but cannot affect the statute limiting the time for exhibiting demands against the estate.

3. Barbara A. Lovering was executrix in fact, of the estate of Lawson Lovering, for more than nine years after the date of her letters, during that time the present demand was never exhibited for allowance, and is forever barred.

4. The administrator is bound by law to plead the statute of limitations against all demands to which it is applicable, and he cannot waive the defence openly and directly, even if he should desire to do so, and of course cannot do the same thing indirectly by an omission of duty or a failure to give notice.

SCOTT, J., delivered the opinion of the court.

Wiggins presented a claim against Fine, as administrator of the estate of Lawson Lovering, to the county court of St. Charles county, which was allowed by the court. On an appeal to the circuit court a judgment was rendered against the plaintiff Wiggins, who is the plaintiff in error.

It seems that Barbara Lovering, the wife of Lawson Lovering, deceased, was appointed administratrix by her husband. She took out letters testamentary, but failed to give the notice of the fact, required by law. Barbara Lovering after having acted as executrix for more than three years from the date of her letters, was replaced by Joshua Fine, the present administrator and party to this suit. The claim was not presented within three years from the date of the letters. The instructions filed in the cause, are full of obscurity, and it is more difficult to discover their point, than to declare the law arising on them. It is for gentlemen concerned in the management of causes in the inferior courts, to determine how far the interest of their clients is promoted by involving the records of causes in so much doubt and obscurity.

The question on which it would seem the cause turned in the circuit

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court, and which has been the only one argued in this court, is, whether an executor or administrator can avail himself of the bar created by the statute limiting the exhibition of demands against an estate, to three years from the date of the letters testamentary, or of administration, unless he shows that he has given the notice of taking out the letters required by law?

The law directs that a notice be published in some newspaper in this State, for three weeks, by an executor or administrator of an estate, informing all persons having claims against said estate, that unless they are presented for allowance within three years from the date of the letters testamentary or of administration, they will be forever barred. This notice must in contemplation of law be effectual; otherwise, why should it be required? Is it not a presumption of law, that the want of this notice may prove an injury to the creditor of a descendent's estate? Why inform creditors that their claims would be forever barred unless some mode of communicating that notice was devised, which would bring home to them a knowledge of it. The publication of it in a newspaper, was thought by the legislature, sufficient for this purpose. Suppose that a personal notice had been required to make the limitation a defence, would it be contended that any claim was barred without proof of such notice? That notice of an inferior quality has been required, is no reason why it should not be published, and yet claim the advantage arising from having given it. We cannot say that no injury resulted from the want of notice, although it might have been ineffectual, for the law has deemed it sufficient. If the publication of notice had been a mere formality, it would not have been required. If a claim should be barred in consequence of not having been presented in three years, when no notice had been given, it would in a contest between heirs and creditors, be postponing the claims of creditors to those of heirs, who are mere volunteers. Our laws no where do this. All debts must be paid before there can be a distribution of the assets amongst heirs and distributees. We have emphatically adopted the maxim, "a man must be just before he is generous." If any injury results from the neglect of the executor or administrator, why should it fall on the creditors, rather than the heirs? It cannot be that the heirs are preferred to creditors; and as to the argument that creditors may sue an executor or administrator for his negligence in not giving notice, if the heirs sustain any injury in consequence of such neglect, why may they not have their action?

We do not think there is much weight in the argument, drawn from the fact that the statute declares, that demands shall be barred unless

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presented within three years from the date of the letters, and not from the date of the notice. That the notice must be published within thirty days from the date of the letters, shows that there can be but little difference in commencing the operation of the bar from the one period or the other. Had the time within which the notice was required to be published been unlimited, or of long duration, the argument from this source would have been conclusive, but as it is, we do not feel its force.

Nor is the confusion in the classification of the debts against an estate, that it is thought will arise from the disallowance of the plea under the circumstances of this case, at all perceived. He who presents his claim after three years, will not be paid until the seventh class is satisfied. He cannot deprive other creditors of their diligence. They are in no better situation than he was. They had no more notice than he had. He cannot complain that he had no notice. The general statute will create a bar, although no notice is required or given, and although its limitation is shorter, as it frequently happens, than the special statute. See *Labeaume vs. Hempstead*, 1 Mo. Rep. 554, 773. The only effect of not giving notice is to take away the bar. He who does not present his claim within three years is in the situation of those whose demands do not accrue within that period from the date of the letters. Because no class is made for these, will they go unpaid?

It will necessarily follow from the foregoing doctrine, that an executor or administrator, who relies on the bar created by the special statute of limitations, must aver in his plea, the fact of the notice having been given, and prove it on the trial. There can be no great inconvenience in this, as our statute relative to advertisements has presented an easy mode of proving a publication in a newspaper, the paper containing which may be easily attached to the records of the administrator. It has been found, upon examination, that in those States where statutes somewhat analagous to that now under consideration prevail, the form of the plea of the statute is as above stated.

Besides the general statute of limitation, there is in several of the States in this country, a limitation provided in relation more especially for suits against executors and administrators. This limitation is created not for their personal convenience, but for the benefit of the estates of deceased persons, and for those interested in them; and therefore although an administrator is not bound to plead the general statute, yet he is bound to plead the statute which relates to him in that capacity. Although an acknowledgment by an executor or administrator,

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after the time limited by the general statute, may revive a debt against a testator or intestate, yet his acknowledgment will not have the effect to take the debt out of the special statute. For he is bound *virtute officii* to plead the latter, whenever a debt is claimed which would be barred by it, and therefore no admission or promise can operate to defeat the statute so pleaded. Such statutes are for the benefit of the heirs and devisees, in order to discharge their estates within a reasonable time from the lien of the debts of the deceased. But although an executor or an administrator cannot waive this bar or destroy its effect, yet he may by his negligence in giving notice of his appointment prevent its accruing, and in such case if either of the other parties suffer a loss, it must be the heirs or devisees, and not the creditors; in which event it has been questioned whether the heirs or devisees would not be entitled to an action against the executor or administrator. *Emerson vs. Thompson*, 16 Mass. Rep. 429; *Brown vs. Anderson*, 13 Mass. 201; *Thompson vs. Brown*, 16 Mass. 172; *Darnes vs. Shed*, 15 Mass. 6.

This summary of the law on a subject which has been but little discussed in our courts, and on which information is wanted; will not it is hoped prove useless, as the character of those by whom these views have been advanced, independently of the soundness of the views themselves, cannot but have some influence on the opinion of those whose province it may be to explore this branch of the law.

The other Judges concurring, the judgment of the court below is reversed.

Judgment reversed.

PRIOR vs. MATTHEWS.

Although replications are filed to an answer to a bill in chancery, all the facts contained in the answer responsive to the bill, must be taken as true, unless disproved by competent proof.

APPEAL from Clinton.

LEONARD AND BAY, for Appellant.

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POINTS AND AUTHORITIES.

The bill of complaint should have been dismissed for want of equity. A court of equity has no power to decree the sale of a chattel, and the distribution of the proceeds among the owners thereof. *Gudgell & Austin vs. Mead and others*, 8 Mo. R. 53.

2. The court had no power to confirm the sale, because the sale so far as related to the rights of the plaintiff, was void.

3. The grounds of the complainant's title—the survivorship of his child, is denied by the answers of all the defendants, consequently the decree was rendered in favor of the complainant without any proof whatever of the truth of the pretended survivorship of his child.

4. But admitting the survivorship of the child, the complainant could not acquire any right to the property except by administration on the estate of the child. *Croslin vs. Baker*, 8 Mo. R. 437.

SCOTT, J. delivered the opinion of the court.

This was a bill in chancery filed by Matthews, the appellee, against Prior and others, heirs and distributees of Katharine Newly, formerly Katharine Potts. The father of Katharine Potts, gave her a female slave to hold during her life, and after her death to her children. The slave was delivered to Katharine, and continued in her possession until she died. Katharine left four daughters, who intermarried with those now made parties to this suit. Matthews, the appellee, married Nancy, one of the daughters, who it is alleged died after her mother, leaving issue an infant child, which child departed this life, after the death of its mother, leaving no brothers nor sisters. The appellee claims as the heir of his child. It does not appear that the appellee ever had possession of the slave. The slave was claimed by the other children, and being sold, this bill was filed to recover one-fourth of her value.

The only material fact charged in the bill which is denied by the answers, is, that the child of Matthews, the appellee, survived its mother. The respondents all deny this, and there is no proof in support of the allegation. Objections were made to the bill, among which was, that it did not contain any equity. They were overruled and a decree was entered in favor of Matthews, for one-fourth of the value of the slave.

Although replications have been filed to the answers, the facts contained in them responsive to the bill, must be taken to be true, unless

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contradicted by sufficient proof. It must then be assumed as true, that the appellee's wife survived her child; if so, then there can be no pretension that he is the heir of that child. He then can only claim as husband. Now, if the slave was reduced to actual possession by Matthews, before the death of his wife, then he was tenant in common with the other heirs; and if they or any of them have disposed of the entire chattel, he has a clear remedy at law. How that matter was, does not appear from the allegations and proofs in the cause. From his claiming as the heir of his child, we might be led to the conclusion, that there never was an actual possession by Matthews, in which event he would have no claim to the slave as husband. *Perdur vs. Jackson*; 1 Russ. Ch. Rep. 1.

The other Judges concurring, the decree will be reversed and the bill dismissed.

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See 8 vol. Mo. Rep. 620.

ERROR to Montgomery.

CAVE, for the Plaintiff in error.

LEONARD & BAY, for the Defendant.

POINTS AND AUTHORITIES.

1. The declaration is defective. Admitting all the facts set forth, the plaintiff is not injured, because he was not prevented from prosecuting his suit by the alleged acts of the defendant, and he has no right to have the property levied upon, applied to the satisfaction of his demand, until he has established it by the judgment of the court. See points made in this case, 8 Mo. R. p. 620-1. In the opinion delivered when this case was last before the court, there is a misapprehension of the facts. The sheriff did not return that "no goods of the defendant in the attachment could be found, except some already levied on to satisfy executions," &c., but he returned that he levied the attachment upon the goods already in his possession under other executions. It is expressly charged in the declaration, that the sheriff levied

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the attachment upon the goods mentioned, and the only complaint is, that the goods were not subject to the execution mentioned in the return. There is not even an allegation that the goods were not of sufficient value to satisfy both the executions in the sheriff's hands, and the demand of the plaintiff.

2. There is a manifest distinction between this case and an action in England, and in those States in which the English practice prevails, against the sheriff for an escape in *mesne process*. If the sheriff suffers an escape on *mesne process*, the plaintiff is prevented from declaring for want of an appearance. He is in effect prevented from prosecuting his action against the defendant, and therefore sustains immediate damage by the act of the sheriff, and his only remedy is, by action against the sheriff. Com. Dig. Title Pleader, Conn't C. 2; 3 Chitty's Practice, 437; the case cited in the opinion of the court, viz: 4 McCord, 372, is found upon the English practice. The authorities cited are English, except the case in 5 John. R. which is not in point, and besides the English practice then prevailed in New York.

3. There was nothing in the alleged act of the sheriff, that prevented the plaintiff from prosecuting his action against the Litchtons. He certainly could sustain no injury until a failure to satisfy his demand as ascertained by the judgment of the court, out of the goods levied upon. The plaintiff had no property in the goods attached, and his right to satisfy his debt out of the goods, depended upon obtaining judgment. See Attachment act of 1835, sects. 6, 41, 51; p. 77, 81-2.

McBRIDE, J., delivered the opinion of the court.

This cause was in this court at the last July term, when the matters, of error then complained of, were fully examined, considered and decided by the court. The writ of error was dismissed because a formal judgment had not been entered on the demurrers. The judgment has been amended, whilst the errors remain uncorrected, hence the cause has again been brought to this court. On a re-argument we see no cause for overruling the decision heretofore made. 8 vol. Mo. Rep. 619. We are fully satisfied that the declaration is good and the pleas clearly bad. Judge Scott concurring herein, the judgment of the circuit court is reversed and the cause remanded.

Williams and Williams vs. The State of Missouri.

WILLIAMS AND WILLIAMS vs. THE STATE OF MISSOURI.

1. The Supreme court will not set aside the verdict of a jury, unless their finding be grossly wrong.
2. To constitute a person a rioter, it is not necessary that he should be actively engaged in the riot; it is sufficient that he be present, giving countenance, support, or acquiescence.
3. The Statute which requires the name of a prosecutor to be *endorsed* on the indictment in certain cases, does not require the name to be on the *back* of the indictment. It is sufficient if it be on any part of the indictment.

ERROR to Howard.

BELT, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The verdict of the jury was against evidence and the weight of evidence, and the court erred in refusing to grant a new trial.
2. The circuit court erred in refusing instructions asked by defendant, as it requires *three or more* to commit the offences charged in the indictment. See Revised code, p. 202-3, sec. 6, 7, 8; also Russell on Crimes, title *Riot*.
3. Verdict in this case erroneous as to William Williams, as there is not a syllable of evidence on which he could be convicted under either count of the indictment. See bill of exceptions throughout;
And court erred in refusing to set aside verdict against William Williams, and grant him a new trial.
4. There is no legal endorsement of the name of a prosecutor on the indictment, in the true meaning of the term *in dorsum*. See *State vs. McCourtney, et al*, 6 vol. Mo. R. 649-52, a case exactly in point. The *endorsement* in this case is appended to the last count in the indictment, and not superscribed upon the back of the indictment; this though a *technical* objection, can be taken by defendants. See *State vs. McCourtney*, above cited, and decisions there referred to.

STRINGFELLOW, for Defendant in error.

POINTS AND AUTHORITIES.

1. It is contended by the State that there was evidence to show that all who were present acted in concert, although Hines may have been most active. The jury properly decided upon the *weight of evidence*.

2. The court refused one instruction asked by defendant. The instruction did not contain the law, nor was it applicable to the evidence. The instruction given by the court contained the law.

3. The bill of exceptions does not show that there was no endorsement of the prosecutor's name—on the contrary the record states that it *was endorsed*. The part of the indictment on which the endorsement is made, is not material. See Rosco—Riot, State Mo. Pierre Williams, R. vol. 3, p. 419 and following.

McBRIDE, J. delivered the opinion of the court.

The defendants with one Jesse Hines, were indicted by the grand jury of Howard county, at the June term, 1844, for a writ under the seventh Article of an act entitled "an act concerning crimes and punishments," approved March 20, 1835, Revised Code, 201. The indictment contained several counts in the usual form. At the foot of the last count, after the name of the Circuit Attorney, is the following endorsement: "I hereby endorse my name on this indictment as the prosecutor in this cause. Signed—

his
JOSEPH X BROWN."
mark.

At the December term following, Jesse Hines, not being found, a trial and verdict of guilty was had against the defendants, and a judgment entered thereon, to reverse which this cause has been brought here by appeal.

The testimony elicited on the trial, shows that Jesse Hines, and the two Williams's, with others, on the night of the 27th February last, after midnight, left their neighborhood and travelled twelve or fourteen miles to the house of Joseph Brown, for the purpose, as alleged by them, of searching for a runaway slave, supposed to be in that vicinity. The company started with two bottles of whiskey, which they replenished on the route, and when they reached a branch three or four hundred yards from Brown's house, they halted and entered into a conversation respecting Brown's character and conduct. One of the company stated that Brown was a bad man, if rumor is true; and if what he had heard about him was true, he ought to be whipped—they would go to Brown's house to warm and to hunt for the runaway negro, and thence to Rice Patterson's field, half a mile off, where they expected to find the negro. They went to the house, rapped at the door, and demanded admittance. Brown enquired who was there, and on being answered that they were friends, he said, "damn such friends,

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he would not open his doors that time of night—he had no enemies in the neighborhood but the Williams's and the Yancey's." He was told if he did not open the door, they would break it down—some one called for a rail—then took a stick of wood and struck on the roof—threatened that they would enter the house through the roof, if the door was not opened, and a proposition was made to get upon the roof of the house. Brown was told that if he did not open the door and submit to have his house searched, they would procure a search warrant—he replied, that the negro was not there, nor had he seen him but once since he ran away; that a few weeks previous some persons had searched his house for negroes and goods, as they said, and had pulled his house down. Brown got his gun, which being seen by Hines, he called for pistols, and directed two of the company to repair to the back door to prevent Brown's escape. The family of Brown were greatly alarmed. When the rioters were in the act of leaving the house, they informed Brown that a company of men would come from Cooper county, and drive him off; and when a short distance from the house they fired off a pistol. Hines was the leader of the party, and did most of the talking—no one discountenanced in any manner what was done.

The foregoing is substantially the evidence given on the trial, by some of those who accompanied the expedition. The testimony of Brown was somewhat variant. On the trial before the circuit court, the defendant asked the following instructions :

1. Before the jury can find either of the Williams's guilty, they must find that three or more persons assembled together with the intent, with force and violence, to commit the injury charged in the first four counts of the indictment.

2. To make a man a party in a riot, he must be active in doing, countenancing or supporting those who engage in such riot, or he must acquiesce in the same.

3. In case of a riot, the violence and tumult must, in some degree, be premeditated.

4. If the jury believe that Jesse Hines, alone, was engaged in the riot, or made an attempt to do an act, which would constitute him a rioter, without the defendants both assisting in such riotous acts, they will find the defendants not guilty.

5. If there is a reasonable doubt of the guilt of the defendants, they must find for them.

The court gave the first, second, third, and fifth, and refused the fourth instruction, to which refusal to give the fourth instruction, the defendants excepted.

After the trial, the defendants moved the court to set aside the verdict assigning for reason that the verdict was against evidence, the weight of evidence, against the law, and the law and the evidence ; which being overruled, they excepted.

They then moved in arrest of judgment, for the reasons : *First*, The name of a prosecutor is not endorsed on said indictment ; *Second*, Because said indictment does not appear by an endorsement thereon, to be preferred upon the information or knowledge of two or more of the grand jury ; or on the information of some public officer. This motion being likewise overruled, they excepted to the opinion of the court in overruling the same.

The first question presented for the decision of this court, grows out of the refusal of the circuit court to grant a new trial. Was the evidence adduced on the trial, in the court below, sufficient to authorize the jury in finding a verdict of guilty against the defendants ?

An examination of the evidence as above detailed, will show that an outrage was perpetrated on the rights of Brown, by the defendants and others. If such conduct be tolerated by the juries of the country, and connived at by the courts, it will inevitably lead to fearful consequences. A citizen who cannot have the protection of the law thrown around him, when quietly and peaceably at home, with his family, will soon be driven to a vindication of his rights, even should it cost the aggressor his life. As the good order and well being of society depend mainly upon the protection which the law gives to individual rights, it becomes the imperative duty of those entrusted with its administration to see that none who violate its provisions escape punishment. Those who were engaged in the riot may have, indeed they must have understood Brown's character, otherwise the enterprise was an exceedingly reckless and hazardous one. If Brown had taken the life of any one, or all of them, he would have been justified by the moral sense of the community.

Although the Williams's were not so prominent as Hines, who appears from the evidence to have been the leader of the posse, yet they were there giving countenance to what was done, and thus became participants in the riot. Besides, this court will not set aside a verdict where there is conflicting evidence, or any evidence upon which a finding could be predicated, unless the finding is a flagrant violation of justice. That power is more safely deposited in the circuit courts ; sitting in the vicinity where the alleged offence was committed, having the witnesses before them they are better enabled to determine whether injustice has been done in the premises.

The next question arises out of the refusal of the circuit court to give the fourth instruction asked for by the defendant.

By comparing that instruction with the second, which this court recognizes as law, it will be seen that there is a conflict between them.—It is not necessary, as the fourth instruction asked for, seems to assume that to constitute an individual a rioter, he should be actively engaged in such riot; it is sufficient as set out in the second instruction, *that he be present giving countenance, support or acquiescence*. If the law were otherwise it would be easy to evade it. Then it would only be necessary to put forward as an active agent, the least scrupulous and responsible of the rioters, whilst the others would stand and encourage him by their presence and approbation, and yet take no active direct part in what was being done. The second instruction containing the law on that branch of the question, and the fourth being so framed as to impair the force of the second, and mislead the jury, the court did right in refusing to give it to the jury.

It is further assigned for error that "there was no sufficient and legal endorsement of a prosecutor on the indictment." The 22d section of 3rd article of "an act to regulate proceedings in criminal cases," Rev. C. 481, provides that "no indictment for any trespass against the person or property of another not amounting to felony shall be preferred, unless the name of a prosecutor is endorsed thereon." Is the writing at the foot of the indictment, as in this case, a compliance with the requisition of the statute? The only authority referred to by the defendant's counsel, and which he relies upon as being decisive on this point, is the case of the State vs. McCourtney and others, 6 Mo. R. 649. The court in that case say that "the statute requires this endorsement to be made before the bill is found, it is consequently a part of the indictment, and must appear on the back of the indictment, as well as the endorsement of the foreman of the grand jury, that the same is a true bill." But what was the question then before the court, and to what was the attention of the Judge directed? This will be manifest by a brief review of that case. That was also an indictment for a riot, without any attempt to endorse the name of the prosecutor, until the motion was made by the defendant to quash, because of the omission. The court sustained the motion; quashed the indictment; the State excepted and brought her writ of error. The question then was, is it necessary on an indictment for a riot, that the name of a prosecutor should be endorsed. The court decide that it is necessary, that the statute requires it; but whether that endorsement should be on the back or on the inside of the indictment, is not decided in the case, as

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the point was not necessarily involved in the enquiry, and the attention of the judge was not directed to it. If the court had so held in that case, the opinion would not be binding; but it cannot be regarded as a decision of the point now at issue. It is true, the court say "it must appear on the back of the indictment," but the language when construed with reference to the point then under consideration, only means that the name of a prosecutor must be endorsed somewhere on the indictment. The object of the statute is to impose a salutary restraint upon the getting up indictments, by requiring those who are mainly instrumental in procuring the indictment, to endorse their name as prosecutor, and subjecting them to the payment of costs under certain contingencies. That end can be attained as well and readily by the endorsement being made on the inside as on the back of the instrument; and indeed it is most convenient and proper so to make it. It being the universal practice, so far as we have knowledge, to make the endorsement on the inside of the indictment, we would not feel authorized to change that practice, unless the point had been distinctly ruled otherwise.

We have been referred to the derivation of the word *endorsement*, which comes from *in* and *dorsum*, and signifies what is written on the back. An effort to limit and circumscribe the word *endorsement*, was made in *Dominus Rex vs. Johann Bigg*, in an ingenious argument before all the Judges at Sergeant's Inn, (see Pierre Williams' R. vol. 3, p. 419 and following,) but without success. By the statute of 8 and 9 W. 3, chap. 19, section 36, the raising an *endorsement* was made felony without clergy. The defendant under this statute was found guilty, of taking out a receipt written on the inside of a bank note, by the use of lemon juice, and a majority of the judges held it to be *raising an endorsement* within the meaning of the statute.

Judge SCOTT concurring in the opinion, the judgment of the circuit court is affirmed.

Judge NAPTON absent.

 BERRY vs. ROBINSON, ET AL.

1. Although a party may have an adequate remedy at law, it does not follow that a court of equity loses its jurisdiction. There are many cases in which courts of law and equity have concurrent jurisdiction.

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2. A being entitled to an interest in the estate of B, conveys his interest by deed to C, and dies. The deed being lost, C has his demand allowed in the county court against the estate of A. C then files his bill in chancery against the administrators of both A and B; and prays to have his demand paid by the administrator of B; or to compel the administrator of A to pay over the distributive share received of the estate of B. Held, that the bill is multifarious in joining the administrator of A, who has no interest in the proceeding against the administrator of B, and is bad on demurrer.

ERROR to Callaway.

REID & HARDIN, for Plaintiff in error.

POINTS.

1. Is the complainant Berry entitled to the discovery sought in a court of equity, and relief prayed for.
2. Has complainant by virtue of the facts stated and exhibits made in said bill, such an equitable right as will be enforced by a court of equity to a decree against Robinson, as administrator, &c., of Samuel Dooly, dec'd, for an amount sufficient to satisfy the judgments rendered in the Callaway county court, vs. the adm'r of Thomas Dooly, dec'd, in his (complainant's) favor.
3. The bill is not, upon its face, destitute of equity, but contains equity, consequently said demurrer should have been overruled, and not sustained.
4. The record may authorize the raising of other questions, all of which it is presumed, however, may be considered under the above heads.

AUTHORITIES.

For 1st point, see generally 1st Story's Equity, and authorities there referred to, page 82, &c.

For 2d point, Armstrong vs. Gilchrist, 2 John. cases 424. Rathborn vs. Warren, 10 John. R. 587, 596. King vs. Baldwin, 17 John. R. 384. See 1 Story, p. 88, and authorities there referred to, note 2.

For 3d point, 1st Story under head of administrators generally, and authorities there referred to.

JAMISON & SHELEY, for Defendants in error.

1. There is a general rule that chancery has no jurisdiction over any

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subject matter, or the power to grant relief where there is a remedy at law; in all such cases the parties will be left to seek redress in a court of law, the only legal and proper tribunal to investigate such matters. See *Blanchard vs. Kenton*, 4 Bibb 451; *McGreery vs. Lewis*, 4 Bibb 323; *Watts & Garraty vs. Hunn*, 4 Little 297; *Brady's ex'rs. vs. Ellis*, 1 Mo. Rep. 402.

2. It being established that the courts of equity will not entertain jurisdiction when there is a remedy at law, the following authorities go to show that the plaintiff had his remedy at law, if as alleged, he was one of the heirs of the said Samuel Dooly, dec'd, or stands in the place of one of the heirs by purchase. See Revised Code 1845, 8th and subsequent sections of the 7th article of the law regulating administration.

3. The bill was defective, and the demurrer properly sustained thereto, because the same concluded with a prayer in the alternative. See *Shields and Hickerson vs. Bogliolo*, 7th Mo. Rep. 134.

McBRIDE J., delivered the opinion of the court.

The complainant brought his bill in chancery against the defendants, alleging that Thomas Dooly, dec'd, was indebted to him on two notes of hand for one hundred and fifty dollars each; in consideration of which, Dooly on the 16th November, 1831, executed a deed by which he assigned to complainant all of his interest in the estate of his deceased son, Samuel Dooly, who died intestate, leaving a large amount of real and personal estate, and that Robinson was appointed administrator. Subsequently Thomas Dooly died intestate, leaving no estate other than the interest which he was entitled to out of Samuel's estate, and that Preston B. Reid obtained letters of administration on the estate of Thomas. The deed from Thomas Dooly to the complainant having been lost or mislaid, he exhibited his demands to the county court of Callaway county, and obtained an allowance against Reid the administrator, for the balance due on the said notes, as also for an open account which he had against the said Thomas Dooly, deceased. Robinson, the administrator of Samuel Dooly, made his final settlement with the county court, by which it appears that there was left of the estate of his intestate for distribution, the sum of \$2000, or upwards. That the said Thomas Dooly, the father, John Dooly, the brother, Sarah Dooly, the sister, and William Dooly, the nephew, of said Samuel Dooly, were the legal heirs and distributees, and as such,

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each were entitled to the one equal fourth part of Samuel's estate, after the payment of debts, &c. That John Dooly has departed this life intestate and insolvent—Sarah and William have also died intestate, and Paul H. Dooly has obtained letters of administration on their estate—and that distribution has been made by Robinson without regard to the complainant's rights. Robinson, Reid and Paul H. Dooly are made defendants.

The bill seeks the enforcement of the assignment made by Thomas Dooly to the complainant, all his right and interest in the estate of Samuel Dooly; or a decree for the payment of his demands allowed by the county court of Callaway county against Reid as administrator of Thomas, out of the estate of Samuel Dooly, deceased, and for general relief. To the bill, the defendants filed a general demurrer, which being sustained, the complainant has brought the case here by writ of error.

The defendants insist that the complainant having a full and ample remedy at law for the enforcement of his rights against the administrator of Samuel Dooly, cannot come into a court of equity to invoke the aid of the chancellor; and refer the court to several decisions to be found in the Kentucky Reports. We have not the means of examining those authorities as they are not in our library, but apprehend they go no further than to assert the general doctrine, that where full and adequate relief can be had at law, a court of equity will not entertain jurisdiction. So our statute regulating practice in chancery asserts the same general rule, (R. C. 506,) and yet in many cases the courts of law and equity exercise concurrent jurisdiction, leaving the party to resort to the one or the other as may best suit his interest or convenience; and the court first obtaining jurisdiction will proceed to try the cause by which the rights of the parties will be concluded. But independent of this practice of the courts which is believed to prevail almost universally in the several States, the sixth clause of the eighth section, first article of an act entitled "an act to establish courts of record, and prescribe their powers and duties," R. C. 155, confers the power on a court of chancery to examine the settlements of administrators, &c., and enforce the payment of legacies, &c. See further on this subject, the case of Erwin and wife vs. Henry, decided at the present term of this court.

Assuming then that a court of chancery has jurisdiction of the subject matter of the bill, we will examine the bill to see whether the demurrer was properly sustained by the circuit court on another ground.

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The bill commences by setting up an equity growing out of the assignment made by Thomas Dooly to the complainant, of all his interest in the estate of his deceased son Samuel Dooly, alleging the loss of the deed evidencing the assignment. This would give the court of chancery jurisdiction, inasmuch as the county court would have no power to entertain a proceeding to ascertain the character and effect of the deed. But being doubtful himself of his rights, and not willing to rest his case upon the deed of assignment, the complainant seeks to obtain a decree against the administrator of Samuel Dooly, deceased, who it appears from the bill, has made a final settlement of his administration, and paid over the balance in his hands to the distributees—or a decree against the administrator of the distributee.

The right then attempted to be enforced either springs out of the assignment from Thomas Dooly, deceased, to the complainant, or the allowance made to the complainant by the county court of Callaway county against the estate of Thomas Dooly. If from the former, we can see no propriety in making Reid, the administrator of Thomas Dooly, a party to the suit, as he can have no possible interest in the result of the controversy under the assignment of his intestate. If the decree should be in favor of the complainant, the administrator of Thomas Dooly will not be effected thereby, and if against the complainant, the administrator succeeds to no rights which he has not already. As the representative of the assignor, there appears to be no greater necessity for making the administrator a party, than there would be in an action at law by an assignee against the obligor of a bond. If Thomas Dooly had by the laws of this State, the interest claimed in the bill, in the estate of his son Samuel Dooly, that interest was by him, in his lifetime, transferred to the complainant.

The bill in this case, like the one in the case of *Jones vs. Paul*, et al., decided at the present term, is defective in making the administrator of Thomas Dooly a party to a controversy in the subject matter of which he has no interest in common with other defendants.

The other members of the court concurring herein, the judgment of the court on the demurrer is sustained.

THAYER, ASSIGNEE OF HENNING, vs. ISAAC R. CAMPBELL, ET. AL.

1. A mortgage cannot be assigned unless the debt to secure which the mortgage is given, be also assigned. The mortgage and debt may together be assigned, and the assignee can foreclose at law.

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2. A mortgage given to secure separate debts due to several persons, conveys a general interest and right of action in each, and may be proceeded on by any one, without joining the others.
3. A proceeding to foreclose the equity of redemption of a mortgagor, under our statute is a proceeding at law, and is not governed by the rules of proceedings in equity.
4. One of several mortgagees has no right to make the other mortgagees defendants, on a proceeding under the statute. They are permitted to come in and make themselves defendants, but can not be compelled to do so.

ERROR to Clark.

LEONARD & BAY, for the Plaintiff in error.

POINTS AND AUTHORITIES.

1. The mortgage was given to secure the payment of several demands, and the interest of the mortgagees being several, each had a right to enforce his claim under the mortgage. *Burnett vs. Pratte, et al.* 22 Pickering, 556. The mortgagees were tenants in common. Statute of 1835, concerning conveyances, sec. 6, p. 119.

2. The mortgagees, Palmer and Lovering, were properly made parties defendants. Had the plaintiff filed his bill in equity to foreclose, instead of proceeding under the statute, he would have been compelled to make the other mortgagees defendants, upon the acknowledged rule in equity, that all having an interest in the subject matter, must be made parties.

Is the rule different in a suit under the statute? This is not considered a common law proceeding, but rather as an equitable proceeding, regulated by statute. *Wilson et al. vs. Bruffee*, admr., 6 Mo. Rep. 635.

It certainly was the intention of the statute to make all persons in interest parties. See statute of 1835, concerning mortgages, p. 409. The statute was not intended for the benefit of a certain class of cases only, but as a salutary regulation of proceedings to foreclose mortgages generally.

3. The statute concerning mortgages does not in any respect change the law as it existed previous thereto, but is cumulative. The act was intended to facilitate the remedy, leaving to the mortgagor his right to proceed in equity. The act should therefore receive a liberal construction, so as to carry out the intention of the legislature.

C. WELLS, for Defendant in error.

The defendant in error insists :

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1. That the mortgage cannot be assigned either at law or in equity without assigning the debt which it was made to secure.
2. The assignee of a mortgage cannot sue at law.
3. At law all the mortgagees must sue. See the statute of 1839, p. 87.
87. Rules of common law can alone be applied. See sec. 13, 14, p. 87.

SCOTT, J. delivered the opinion of the court.

Campbell, the defendant in error, executed a mortgage on real and personal estate, to secure three several distinct debts which he owed to James S. Henning, and two others. Henning assigned his interest in the mortgage to Thayer the plaintiff, by a writing endorsed on the mortgage, in these words; "For and in consideration of the sum of five hundred and sixty-eight dollars and twenty-seven cents, it being a note held by him against me for that sum, dated Nov. 22d, 1842, and due 6 months from date, I assign all my interest in the within mortgage to Martin Thayer. All collected over said amount to be paid to me." The mortgage recited that Campbell was indebted to Henning in the sum of \$597 87 by judgment, and the sum of \$26 32 by bond. Thayer filed a petition under the statute to foreclose Campbell's equity of redemption, and made the two other mortgagees defendants in the suit.

To this petition there was a demurrer, which was sustained by the court below, and judgment entered against the plaintiff, to reverse which he has prosecuted this writ error.

In support of the judgment rendered in the court below, the defendants in error rely on four grounds, viz:

1. That an assignment of a mortgage cannot be effected without an assignment of the debt, whose payment is thereby secured.
2. The assignee of the bare mortgage cannot sue at law.
3. That all the mortgagees should have joined in the suit.
4. That the other mortgagees were improperly made parties defendants, this being a statutory proceeding according to the course of the common law, and not a proceeding in conformity to the course and practice adopted by courts of chancery.

The doctrine is asserted in the books that the assignment of a mortgage is regarded as a nullity. *Wilson vs. Troup*, 2 Cow. 195. This, however, must be intended of cases in which the mortgage alone is assigned, and in which it was the intention of the parties that nothing but the mortgage, disconnected from the debt whose payment was secured by it should pass. It cannot be applied to cases in which although an assignment of the mortgage is in terms made, yet it is clear

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from the transaction, that the debt was likewise designed to be transferred. No form of words is exclusively appropriated to create an assignment of a debt. The contract of assignment is to be construed like all other contracts, and as in them, the intention of the parties must prevail, so in this. The assignment endorsed on the mortgage clearly shows that it was designed to transfer as well the debt as the interest in the land. The greater portion of the debt recited in the mortgage, and secured by it, was due on a judgment. It was not evidenced by a bond or note—things capable of delivery. In what more authentic manner could an assignment of a judgment have been effected? There is no foundation in reason or policy for narrowing the construction of the statute allowing an assignee of a debt secured by a mortgage to bring a petition to foreclose the equity of redemption in his own name, to those cases only in which the assignee of a debt could sue at law for its collection. It must have been in the contemplation of the legislature that mortgages are frequently executed to secure the payment of debts whose existence cannot be shown by note or specialty.

The second reason urged in support of the demurrer has been answered by what has been said in relation to the first.

Considering the purposes for which the mortgage was given, we cannot see the necessity or propriety of all the mortgagees uniting as plaintiffs in this suit. Although there is but a single deed of conveyance, yet when we consider that it was executed to secure three several and distinct debts, due to three several individuals, it must be regarded as clearly several in its nature as if those several instruments had been simultaneously executed. A conveyance of interests in land to several, by one instrument, does not necessarily make those interests joint. It is said, though a man covenant with two or more jointly, yet if the interest and cause of action of the covenantees be several and not joint, the covenant shall be taken to be several, and each of the covenantees may bring an action in his own name for his particular damage, notwithstanding the words of the covenant are joint. 1 Saund. 154. In the case of *Burnett vs. Pratt*, 22nd Pick., the court held it clear that if a mortgage is given to two or more persons to secure their several debts, the mortgage is several and not joint. That each mortgagee has a right to enforce his claim under the mortgage. If the debts secured are equal in amount, the mortgagees will have an equal interest in the mortgage; if unequal, their shares will be proportionate to the amounts of their respective debts. As to the difficulties which may be suggested as growing out of the law relative to joint tenancies, in

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opposition to this construction of the mortgage, it may be remarked that they are all removed by our statute regulating conveyances, which makes every conveyance to two or more persons a tenancy in common, unless it is expressly declared in such conveyance to be in joint tenancy. Digest, sec. 6, 119.

If the three mortgagees joined in the suit, there could be but one judgment. One of the claims under the mortgage might be contested, and would involve long and tedious litigation, the others might be undisputed, why should those whose claims are admitted to be just, be compelled to suffer the delay and incur the trouble incident to a protracted litigation?

We cannot acquiesce in the view, that the proceedings under the statute relative to mortgages, are like those in courts of equity, or that such proceedings can derive any aid from analogy to the course of practice in those courts. The foundation for the argument is a casual remark made by a judge of this court, in delivering an opinion, and it is strange that it should be relied on for such a purpose, when it had been solemnly determined in the case of Carr vs. Holbrook, et al. 1 Mo. Rep. 240, that proceedings to foreclose a mortgage under the statute, are proceedings at common law, and not governed by the rules in chancery, and when that opinion had been sanctioned and adopted by the late case of McNair vs. Biddle, 8 Mo. Rep. 257. But the act of Feb. 9th, 1839, sec. 13, has put this question at rest, by providing that in all suits commenced in virtue of the act now under consideration, the courts shall proceed as in other actions at law, except in cases not otherwise provided for.

The greatest difficulty in this cause grows out of the fact of making the other mortgagees parties defendants. In proceedings in chancery, if it appears that a party having no interest in the subject matter of the suit is made a defendant, it is generally a cause of demurrer. If this were a procedure according to the course of a court of equity, the mortgagees who are made defendants, could not demur, because it is clear that they are interested, and their interest appearing, a bill would be demurrable in which they were not made parties. The rule being, when a party having an interest as plaintiff will not join in the suit, as such, he must be brought before the court as a defendant. The statute now under consideration is *sui generis*, and it must be confessed, that taken in connexion with the interpretation it has received, it is full of embarrassment and difficulty. The idea of such a proceeding had its origin at an early day in this State, before there was such a thing as a court of equity as contradistinguished from a court of law. At the

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time of the first enactment of this law, in the year 1807, the transactions of our people were simple, and freed from those entanglements growing out of an extensive intercourse and commerce. It was probably designed for those cases in which there was only a mortgagor and mortgagee. Confined to such, there was no difficulty attending its execution. Subsequent legislation has made changes in the law, and in practice it has been applied to cases in which many conflicting interests were involved. The interpretation put upon it by this court, is, that if the first mortgagee files a bill to foreclose, and obtains a decree, the mortgaged property will be sold without regard to the rights and interest of subsequent incumbrancers. They at their peril are required to take notice of the proceedings—to come in and have themselves made defendants in order to protect their rights. *Mullanphy vs. Simpson*, 3 Mo. Rep. 345. *Russell vs. Heirs of Mullanphy*, 4 Mo. Rep. 319. The only inducement the first mortgagee could have for proceeding under this statute, is that he may have a clear sale, without making subsequent incumbrancers parties. Had it been held that those not made parties to the proceedings could not have been affected by them, all motive for adopting the statutory mode of foreclosure would have been removed, and the statute would have been confined to those cases for which, in all probability, it was originally intended. The late revision of the laws has remedied this inconvenience in a great measure, and the new provisions engrafted on this statute will have the effect which it ought to have, of inducing all mortgagees, in cases of embarrassment growing out of the number of incumbrances or from other causes, to resort to a bill in equity in order to obtain a foreclosure of the equity of redemption. From this view of the subject, it cannot well be perceived how the other mortgagees, can be injured by being made defendants, but although they ought not to complain of being thus treated, yet we cannot reconcile their joinder as defendants, with the rights of the mortgagor, who is the proper defendant in this cause. The plaintiff might certainly have brought a bill in equity to foreclose the equity of redemption, and then the other mortgagees would have properly been made defendants. He has not thought proper to adopt that mode of procedure, but has taken the statutory remedy. By the statute those interested are permitted to come in and be made defendants.

There is no other mode designated by which they can be made parties to the suit, and it would seem that the mode of becoming parties is not very material. But the manner of becoming a party, may affect the interest of the mortgagor, and the courts will certainly be disposed to protect his rights. If one mode of becoming a party, defendant will

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be attended with less cost to the mortgagor, than the other, it will certainly be a reason for choosing that one, especially as it is within the words of the law, and for rejecting the other. The fees for serving process, and the costs of an order of publication in many cases, which are considerable, would be an additional burden thrown upon the mortgagor, if parties are permitted to be made by the petition. As the statute nowhere authorizes such a mode of making parties, as it is rather against the spirit of the construction put upon the act, and as it will in many cases considerably increase the costs of the mortgagor, we feel ourselves constrained to refuse it our sanction.

Judgment affirmed.

McBRIDE, J., did not sit in this case.

MARTIN vs. THE STATE.

An indictment for a riot, alleging an "intent to make an assault," must charge it to have been "with force and violence." It is not sufficient to charge it to have been "with force and arms."

APPEAL from Benton

WINSTON, for the Appellant.

POINTS AND AUTHORITIES.

1. The appellant contends that the indictment does not pursue the words of the statute, and is therefore bad. See Revised Code p. 202, sec. 6; 5 Mo. Rep. 359, 361.
2. The indictment is bad for duplicity.
3. The indictment is for a misdemeanor, and charges a felony.

McBRIDE, J., delivered the opinion of the court.

The defendant with divers other individuals, was indicted by the grand jury of Benton county, at the December term, 1843, of the circuit court for a riot. The defendant having taken a separate trial, was found guilty, whereupon he moved the court for a new trial, and in arrest of judgment, assigning among other reasons the following: "The indictment is not such a one as the court ought to render a judgment upon, the same being wholly informal and insufficient," which being overruled he excepted and took an appeal to this court.

Martin vs. The State.

The indictment charges that "William L. Vaughn, Jonathan Martin and others, (naming them,) heretofore, to-wit: On the 19th September, A. D. 1843, at the county of Benton and State of Missouri, did then and there *with force and arms*, unlawfully, riotously and tumultuously assemble themselves together with the intent to commit an assault upon the body of Samuel Yeates, and did then and there, being so assembled as aforesaid, *wickedly, riotously, and unlawfully assault* and beat, whip, bruise and maim the said Samuel Yeates, to-wit: at the county of Benton and State of Missouri, contrary to the form of the statute," &c.

The indictment is framed upon the 6th section of the 7th article of an act entitled "an act concerning crimes and punishments," Revised Code 202, which provides that if three or more persons shall assemble together, with the intent or being assembled shall agree mutually to assist one another to do an unlawful act, *with force and violence*, against the person or property of another, or against the peace, or to the terror of the people, and shall accomplish the purpose intended, or do any unlawful act in furtherance of such purpose in a violent or turbulent manner, every person, &c.

It is a well settled principle, that an indictment framed upon a statute, must state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it, and must with certainty and precision charge him with having committed, or omitted the acts constituting the offence, under the circumstances and with the intent mentioned in the statute; and the defect will not be aided by verdict, nor by a conclusion *contra formam statuti*. The pleader should keep close to the expressions of the statute, otherwise his indictment will be bad, notwithstanding he may use the fullest common law description and legal definition of the offence. Barbour's Crim. Treatise 290. An indictment on that part of the black act, which made it felony "*wilfully and maliciously*" to shoot at any person in a dwelling house or other place was holden bad, because it charged the offence to have been done "*unlawfully and maliciously*." R. vs. Davis, Leach 556. So, an indictment upon statute 7 and 8 G. 4, C. 30, § 2, for feloniously, voluntarily and maliciously setting fire to a barn, was holden bad, because the words of the statute are "*unlawfully and maliciously*." R. vs. Turner, R. & M. 239.

The same principle has been recognized by this court in several adjudications. See State vs. Comfort, 5 Mo. Rep. 357; State vs. Martin, Ib. 362; State vs. Mitchell, 6 Mo. Rep. 147; State vs. Helm &

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Thornhill, Ib. 236; State vs. Brown, 7 Mo. R. 210; State vs. Spratt, Ib. 247.

By an application of the foregoing rule to the indictment in this case, it will be found to be defective. The indictment charges that the defendants did "unlawfully, riotously and maliciously assemble themselves together, with the intent to commit an assault." But what was the character of that assault, in the intention of the defendants, at the time of assembling, is not stated. The statute however declares that it must be in the mind or contemplation of the defendants, not only to do an unlawful act, but to do such act "*with force or violence.*" If those latter words had been inserted in the indictment, after the word *assault*, the indictment would have been good; without them we are of opinion it is bad, and the court erred in not sustaining the motion in arrest of judgment.

The other members of the court concurring herein, the judgment of the circuit court is reversed.

STATE, TO THE USE OF CRAWL vs. FERGUSON, ET AL.

1. The Statute of 1835, which prescribes the limitation to actions upon a constable's bond, does not begin to run until the expiration of the term for which the constable was elected, and is not affected by the resignation of the constable.
2. The plea of *non est factum*, to an action of debt on such a bond, puts in issue only the execution of the bond.

APPEAL from Camden Circuit Court.

G. W. MILLER, for the Appellant.

PHELPS, for the Appellees.

POINTS AND AUTHORITIES.

1. The appellees insist that as the bill of exceptions shows there was other evidence given on the trial besides that incorporated in the bill of exceptions, the judgment will not be reversed.
2. That the appellant was not entitled to recover upon the evidence preserved in the bill of exceptions.

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3. That this court will not reverse a judgment because an erroneous instruction was given, unless the party shows by his bill of exceptions, that he is entitled to recover. *Newman vs. Lawless*, 6 Mo. Rep. 279; *Finney et al vs. Allen*, 7 Mo. Rep. 416; *Vaulx vs. Campbell, ex'r*. 8 Mo. R. 224; *Cawthorn vs. Muldrow*, Ib. 617.

McBRIDE, J., delivered the opinion of the court.

This was an action of debt brought by the plaintiff, against the defendants, on a constable's bond, to the March Term, 1844, of Camden circuit court. The defendants filed a plea of *non est factum*, and gave notice of special matter. Issue was joined on the plea, and at the March term, 1845, the parties went to trial.

The bill of exceptions shows that on the trial, the plaintiff read in evidence the bond of the constable, dated the 19th Aug. 1840. The defendant then introduced evidence conducing to prove, that more than two years prior to the commencement of this action, he had resigned his office of constable, to the introduction of which, the plaintiff objected, but his objection being overruled by the court, the evidence was given to the jury, thereupon the plaintiff excepted to the decision of the court, in overruling his objection and permitting the evidence to go to the jury. The plaintiff then asked the court to instruct the jury, "that if the jury believe from the evidence, that said suit was commenced within four years from and after the time, said Ferguson was elected a constable of Harmony township, in Pulaski county, the said suit is not barred by limitation of law." Which the court refused to give, and the plaintiff excepted. A verdict having been rendered for the defendant, the plaintiff filed his motion for a new trial, assigning the foregoing, with other reasons, for a new trial, but the court overruled the motion for a new trial, whereupon the plaintiff excepted, and brings his case here by appeal.

The questions raised by the record are: 1. Did the court err in permitting the evidence offered by the defendant, and excepted to by the plaintiff, to go to the jury? 2. Did the court err in refusing to give the instruction asked by the plaintiff?

If the instruction asked by the plaintiff should have been given to the jury, then the evidence offered by the defendant, or any other evidence conducing to show when the defendant resigned his office of constable, for the purpose for which it was given, was irrelevant and immaterial to the issue, and should have been excluded by the court.

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The first section of an act entitled, "an act concerning constables, R. C. 116, prescribes the time and manner of electing constables, "who shall hold his office for two years and until his successor be elected and qualified." The second section relates to the bond to be given by the constable; the third section provides for filling vacancies in the office; the fourth section is in these words: "The constable's bond shall be filed with the clerk of the county, and may be sued upon at the instance of any one injured by its breach, (a certified copy of the bond shall be evidence in any suit; if a verdict be given for the defendant, or the suit be discontinued, the person at whose instance the suit was brought, shall pay all costs.) *No suit shall be instituted on such bond after two years from the expiration of the time for which the constable was appointed.*" This latter clause of the fourth section is so plain and intelligible, as to leave no room for construction. Ferguson was elected constable at the general election in 1840, to hold his office for two years, and until his successor be elected and qualified; hence the statute of limitations did not commence running, until after the general election of constables in August, 1842, and his having resigned his office before its legal termination, does not change the law. Although the instruction asked, does not fix the termination of the office as the period when the statute commences running, yet it amounts substantially to the same thing—there being no difference in time between four years from a given period, and two years after the termination of two years from the same period. We think therefore the instruction should have been given.

Several other points have been presented, but as they do not arise on the record, we have not considered them. It is also urged that the bill of exceptions does not contain all the evidence, or if it does, the plaintiff does not show thereby his right to recover. As a general rule, all the evidence given in the case, on the trial below, should be embraced in the bill of exceptions, and a failure to do so, will raise a presumption in favor of the correctness of the action of the circuit court. In this case enough is apparent in the bill of exceptions to show that the circuit court committed an error in permitting irrelevant evidence to go to the jury, as also in refusing to give the plaintiff's instruction to the jury. The decision of the law, as embraced in the instruction refused by the court, may have precluded entirely the plaintiff's right to recover on the merits, under any possible state of the evidence. But we are inclined to the opinion that under the plea of *non est factum*, which was the only plea in the case, and which only put in issue the execution of the bond, the giving the bond in evidence, without any

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evidence having been offered to impeach it, showed a right in the plaintiff to recover, as all the other matters in the declaration not answered, were admitted.

The other members of the court concurring herein, the judgment of the circuit court is reversed and the cause remanded.

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No exceptions being taken until after a verdict rendered by the circuit court sitting as a jury, the judgment will be affirmed.

ERROR to Warren.

C. WELLS, for the Plaintiff in error.

The Plaintiff makes the following

POINTS.

1. The bond was assigned to McClelland, who was indebted to the maker Kilgore, and he notified of the assignment. It could not be legally transferred by the cancellation of the assignment. That McClelland did not pay McMurtry for the bond at the time, can make no difference—he promised to do so, and the sale was good.

2. It was a fraud on Kilgore to permit McClelland to hold the note until he broke, and then to re-transfer it.

WM. M. CAMPBELL, for Defendant in error.

POINTS AND AUTHORITIES.

1. The pretended assignment to John A. McClelland, did not divest the legal title of the bond in the said McClelland, because it was never signed.

2. The said bond was transferred to McClelland for collection merely, and McClelland never had any beneficial interest in it, and any interest that he might have acquired in said bond, by said pretended assignment, was extinguished by his delivery thereof to McMurtry to be cancelled, and the erasure of the assignment.

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3. No improper testimony was admitted in the court below, on behalf of the plaintiff Bonic.

4. No objections were made nor exceptions taken in the circuit court, on account of the introduction of illegal testimony, nor was any such ground alleged as a reason for a new trial, and no objection can be raised in this court on that account. 7 Mo. Rep. 120, 124, Abell & Isbell vs. Shields; 5 Mo. Rep. 387, 393, 394; Rev. Statutes 105, secs. 2, 3, 4, 5.

Scott, J., delivered the opinion of the court.

Kilgore executed a bond to Wm. McMurtry for \$76, which was placed in the hands of John A. McClelland for collection. At the time of the delivery of the instrument to McClelland, the following words were endorsed on it to-wit: "I for value received do assign the within note to John A. McClelland." This endorsement was not signed by McMurtry, the obligee of the bond, McClelland's father was the stage proprietor on the route from St. Charles to Fayette, and was indebted to the defendant Kilgore in the sum of \$100, who was a driver on the line. McClelland was agent for his father in superintending the route, and the bond was placed in his hands that he might receive the amount of it in the services of Kilgore as a driver. McClelland promised McMurtry that so soon as he could collect a sum sufficient he would pay the bond. It does not appear that the father ever knew that the bond was in the hands of his son for collection, nor was it known that the father had ever charged Kilgore with the amount of it. McClelland, the father, afterwards failed, and the bond was returned to McMurtry, who assigned it to the plaintiff Bonic. No instructions were asked, and the cause was submitted to the court sitting as a jury, and a verdict was rendered for the plaintiff Bonic.

This is a case in which the only errors complained of, are those committed by the court sitting as a jury. No exceptions were taken to the introduction of any evidence, and no instructions were asked, and it is not until a verdict is rendered against him that he ascertains the judge does not apply his law correctly. His knowledge then came too late to avail him. He should have asked the court to declare the law of the case by instructions as soon as the evidence was closed. By omitting to do so, this court cannot see whether the court below erred in applying the law or in finding the issue. If the latter was the cause of complaint, the court would hardly interfere, seeing the superiority of

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the means enjoyed by the circuit court for determining the credibility of the witnesses.

Judge McBRIDE concurring, the judgment of the court below will be affirmed—a judgment in full accordance with that which would have been rendered on the merits.

JONES vs. PAUL, ET AL.

Jones filed his bill in equity, in which he charged that he had purchased a tract of land, at a sale made under an execution, issued by the clerk of the circuit court, upon a transcript of a judgment of a justice of the peace. That the defendant in the execution had conveyed the land to one Marshall. That the deed to Marshall was fraudulent and void as to creditors. And was, though absolute upon its face, in fact a mortgage. It prayed,

First. To have the deed set aside.

Second. To compel the mortgagee to account, and that complainant be permitted to redeem.

Held,

1. That the bill was multifarious, and that a demurrer would lie.
2. That the question as to the validity of the judgment under which the land was sold—the return of the execution issued to the constable—the validity of the execution issued by the clerk—or the deed made by the sheriff, although made a part of bill, could not come up on demurrer; but must be decided by the circuit court when offered in evidence.

ERROR to Platte.

ISAAC N. JONES, for the Plaintiff in error.

STRINGFELLOW, for Defendants in error.

POINTS AND AUTHORITIES.

1. The bill charges that the deed from Paul to Marshall is fraudulent and void, and at the same time admits it to be a mortgage, and prays to redeem.
2. It does not show any title in complainant: 1st. The sheriff's deed is insufficient in not showing that the property was advertised for sale according to law, or that it was sold according to law. See Stat. 1835 p. 258, §38-'9-45. 2d. The judgment rendered by the justice is void,

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there being no service of process. Stat. 35—title Justice's Courts. 3d. There was no execution returned according to law, by the constable. It was returned on the day it was issued—and was not returned that "defendant had no goods or chattels whereof to levy the same"—but "that no property belonging to defendant was found in the township." Stat. p. 364, § 19. 4th. The execution issued to the constable did not correspond with the judgment. 5th. There is no exhibit filed and referred to, showing that the copy of the judgment had ever been filed with the clerk. 6th. The execution issued by the clerk was not issued upon the transcript of the judgment filed in his office, but upon a transcript of a different judgment and for costs incurred after filing the copy of the judgment.

3. The bill is multifarious. In one part it prays an account of the rents and profits of the mortgaged premises, a conveyance of title from Marshall, and a foreclosure of the equity of redemption of Paul. And in another, an account of money not alleged to have been received on, or to be applied to discharge a mortgage.

4. The bill is not to redeem but to foreclose, and shows no right in plaintiff.

McBRIDE, J., delivered the opinion of the court.

The complainant filed his bill on the chancery side of the Platte circuit court, on the 26th August, 1844, against the defendants.

The bill states that Samuel Paul, and Elmira Paul, his wife, on the 14th July, 1842, conveyed by deed to Frederick Marshall lot number 2, in block numbered 31, in Platte City, for the consideration of \$110, as expressed in the deed. On the 10th October, 1843, the complainant obtained before a justice of the peace in Platte county, a judgment against the defendant Paul, for about \$87, debt, interest and costs, upon which execution issued, which was returned instant, "No property found of the defendant in my township whereon to levy this execution, 13th Nov. 1843." On the 11th October, 1843, the complainant obtained a transcript of his judgment, and filed the same in the office of the clerk of the circuit court of Platte county, upon which an execution was issued by the clerk on the 13th November following, which was by the sheriff levied on the lot conveyed by Paul and wife to Marshall, and the lot sold by virtue thereof on the 9th April, 1844, when the complainant became the purchaser at the sum of \$5, and received the sheriff's deed therefor.

The bill further states that the lot and improvements thereon were

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worth at the time of the conveyance from Paul and wife to Marshall, the sum of \$400, and the yearly rent about \$80; that the deed although absolute on its face, was only intended as a mortgage to secure a debt due from Paul to Marshall of \$110. The bill then proceeds, "your orator further charges that Paul and wife conveyed said lot to said Marshall to defraud, hinder and delay the creditors of said Paul—said Paul being at that time insolvent, and having no other property subject to execution." Since the 14th July, 1842, Paul assigned to Marshall a claim he held against Platte county, amounting to \$400, to protect the same from the payment of his debts, and since the transfer, Marshall has received a large amount of said claim—that complainant notified Marshall of his claim against Paul, and requested him to retain in his hands an amount sufficient to pay complainant's debt. The complainant has proffered to pay Marshall the balance due him from Paul, after deducting the payments made by Paul, the rents and profits of the house and lot, and the usury charged in the transaction, should there be any balance, and concludes by propounding a number of interrogatories to the defendants, with a prayer for the foreclosure of the mortgage, the setting aside the deed for fraud, and for general relief.

To the bill, the defendants filed their joint and several answer, to which the complainant filed his exceptions. Afterwards by agreement the answer was withdrawn, and the defendants filed a general demurrer assigning special causes to the bill; whereupon the complainant obtained leave to amend his bill; the amendments sets out more fully the exhibits referred to in the bill and makes them a part thereof, and concludes by reiterating substantially the interrogatories put by the bill. The defendants again demurred, which being sustained by the court, and the bill dismissed, the complainant has brought his case in this court by writ of error.

The counsel on both sides have presented many points which cannot legitimately arise on the demurrer, and which this court will not now examine in detail. Whether the judgment of the justice of the peace is regular—whether the return of the constable on the execution, is sufficient in law—within what time the constable may make his return so as to authorize the clerk to issue an execution from his office on the transcript—and whether the deed of the sheriff contains all the recitals required by our statute, are questions which will more properly arise on the trial and must first be presented to and decided by the circuit court, before this court can entertain them. For those questions to be decided on demurrer would be almost equivalent to a trial of the cause upon its merits.

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The bill first charges the defendants, Paul and wife, with having executed a deed of conveyance to their co-defendant Marshall, which although unconditional on its face, was intended by the parties thereto as a mortgage to secure the sum of \$110, due from Paul to Marshall. Pursuing this view of the transaction, until complainant obtains his judgment, files his transcript, and has an execution issued which will reach the real estate of Paul, the complainant then abandons the idea of a mortgage, and charges that the deed was made in fraud, to hinder and delay the creditors of Paul. In confirmation of this latter charge, the bills alleges that since the conveyance of the lot, Paul has assigned to Marshall a demand of some character or description, which he had against the county of Platte, amounting to about \$400, to prevent his creditors from getting it, and that Marshall having received a large amount of that fund, refuses to render him an account thereof.

As an excuse for thus blending in one bill two distinct causes of action, the complainant urges that not knowing precisely the character of the transaction, which he calls upon the chancellor to unravel for him he has been driven from necessity to present his bill with a double aspect.

This court cannot recognize any such necessity, but holds it to be the duty of the complainant to ascertain his rights, and the means adopted by others to defeat or withhold from him the exercise and enjoyment thereof before he applies to a court of equity for relief. Then he will be able to present his case with clearness and brevity. If he does not know what are his rights, how is he prepared to say that his rights have been violated? Shall the mere vague belief or suspicion of a complainant, that he has been defrauded or wronged in one of two modes, be the basis of the action of a court of chancery?

The bill in chancery answers to the declaration in a suit at common law; as at common law, so likewise is it desirable in chancery, that the matters in controversy shall be narrowed down to as few issues as practicable. This rule is not only beneficial to parties litigant, who thereby have an additional guarantee that justice will be afforded, but likewise due to the courts as it tends to divest causes of much of their complication and embarrassment. The rule should not be lost sight of in endeavoring to carry out another favorite object of a court of equity, the prevention of a multiplicity of suits.

In Mitford's Chy. Pl. 181, it is laid down as a general principle that the court will not permit the plaintiff to demand by one bill, several matters of different natures against several defendants, and the reason assigned is that it would tend to load each defendant with an unneces-

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sary burden of costs, by swelling the pleadings with the state of the several claims of the other defendants, with which he has no connexion. The same principle is recognized in the case of *Fellows vs. Fellows*, 4 Cowen, 700; 2 Madd. Ch. 294; 2 Har. Ch. Pr. 289; 1 East 227.

In the case of *Gaines, et ux. vs. Chew, et al.*, 2 Howard 642, the court say "that a bill which is multifarious may be demurred to for that cause, is a general principle, but what shall constitute multifariousness is a matter about which there is a great diversity of opinion. In general terms a bill is said to be multifarious which seeks to enforce against different individuals, demands which are wholly disconnected. In quoting from the case of *Campbell vs. Mackay*, 7 Simon 564, when it is said that "to lay down any rule applicable universally, or to say what constitutes multifariousness as an abstract proposition, is, upon the authorities, utterly impossible." The judge then proceeds to declare that "every case must be governed by its own circumstances; and as these are as diversified as the names of the parties, the court must exercise a sound discretion on the subject."

The two grounds of relief sought for in this bill, are wholly dissimilar and disconnected. If, as first charged in the bill, the deed is a mortgage, then the defendants should not be forced to prepare themselves to defend against the charge of fraud. And if the transaction be a fraudulent one, there will be no necessity of inquiring whether the deed, absolute on its face was intended by the parties to be a mortgage. Which question shall the court investigate? Or shall the investigation of both proceed at the same time? If so, the proceedings are not only rendered embarrassing and complicated, but the defendants if acquitted of fraud, will be subjected to greater inconvenience and cost than they should be, and for what reason? Not perhaps in consequence of any wrong committed by them, but because the complainant has not taken the trouble to inform himself correctly as to his rights.

In the exercise of a sound discretion, therefore, the court might very properly require the complainant to elect upon which charge in the bill he will base his claim for relief at the hands of the chancellor, and to frame his bill accordingly. For whilst the door of the courts of chancery are always open, and the courts are ever ready to grant relief to those who are aggrieved and who seek her aid, because an adequate remedy cannot be obtained at law, they will also bear in mind that defendants likewise have rights which it is equally their duty to protect.

We are therefore of opinion that the circuit court committed no error in sustaining the demurrer to the bill.

The effect of the judgment of the court in dismissing the bill, will be

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to require the complainant, if he desire further to prosecute the matter, to file a new bill, and will not operate as the complainant appears to apprehend as a bar to a future action. Where a suit is dismissed upon a hearing upon the merits, it is ordinarily, unless the dismissal is without prejudice, a bar to another bill; whereas if the bill is dismissed for defect of form or structure, not going to the merits, it is no bar to a future suit for the same subject matter. See Story's Equity 359; 2 Madd. Ch. Pr. 248; 7 John. Chy. R. 286; Mitford Eq. Pl. 216.

The other members of the court concurring herein, the judgment of the circuit court is affirmed.

STATE OF MISSOURI TO THE USE OF MITCHELL, vs. KIRBY.

It is not necessary that a constable's bond should specify the township for which he was elected. A bond in which the name of the township is left blank, is valid.

ERROR to Jackson.

STRINGFELLOW, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. That it is not necessary that a constable's bond should set out the name of the township—but that a bond conditioned only to discharge the duties of his office as constable, is sufficient. Statute '35, p. 116, § 2 & 7; Sess. Acts 1842-3, p. 75.

2. If it be necessary, it may be shewn that it was omitted by mistake, and the omission supplied by proof. Starkie's Ev., title *Parol Evidence*, side p. 556, 557, vol. 2 & note 1; 13 Mass. Rep. 158; 2 Dallas, 180.

HALL, for Defendant,

Relies upon the following

POINTS AND AUTHORITIES.

1. The declaration does not aver that the several judgments upon which the executions, in the declaration mentioned, issued, are yet unpaid.

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2. It does not aver that said executions were delivered to said Kirby as constable of Washington township.

3. It does not aver that said executions were not returned by order of plaintiff's agent.

4. In the bond set out in the plaintiff's declaration, there is not such a degree of moral certainty as to leave on the mind of a reasonable man no doubt of the intent of the parties. In no part of the instrument can we collect what was the name of the township of which the defendant is charged as having acted as constable. The bond in this respect is utterly void. See *Grant & Finney vs. Brotherton's Admr. to the use of Janney*, 7 Mo. Rep. p. 458; *Cole's Admr. vs. Hulme*, 8 Barn. & Cress. 568; *Wagh vs. Bussell*, J. C. L. R. 1st vol. p. 241; *Say vs. Loyd*, 4 Brown's Par. Cases, p. 73.

5. A demurrer only admits that part of a declaration which is well pleaded to be true. A declaration is bad upon a demurrer after oyer craved, which supplies by averment any material word to the instrument sued on. See *Warder vs. Evans* 2 Mo. Rep. p. 166. As to the right of contradicting, adding to, altering or varying a written instrument by parol testimony, see *Lane vs. Price*, 5 Mo. Rep. 101; *Benson vs. Peebles*, 5 Mo. R. p. 132; 1 Phillips on Ev. p. 480; Cowen & Hill's notes on Ph. on Ev., p. 1394, 1437, and authorities there cited.

McBRIDE, J., delivered the opinion of the court.

This was an action of debt brought by plaintiff against the defendant on a constable's bond. The defendant craved oyer of the bond, set it out and demurred.

The condition of the bond is, "that whereas the above bounden Richard Kirby was duly elected constable of ——— in the county of Jackson and State of Missouri, at the general election held on the first Monday, Tuesday and Wednesday in August, 1840, until the next general election. Now, therefore, if the above bounden Richard Kirby shall serve all process to him directed and delivered, and shall pay over all moneys by him collected thereon, and in all other respects shall well and truly do and perform all and singular the duties that now are or may be enjoined on him by law to do and perform, as constable of said township, then this obligation to be void, else to remain in full force and effect."

The demurrer having been sustained, the plaintiff has brought the case here by writ of error.

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Two points growing out of the record, are presented for the decision of this court.

1. "It is not necessary that a constable's bond should set out the name of the township—but a bond conditioned only to discharge the duties of his office as constable, is sufficient."

2. "If it be necessary, it may be shewn that it was omitted by mistake, and the omission supplied by proof."

The second section of "an act respecting constable's," R. C. 116, provides that "Every constable, within ten days after his election or appointment, shall give bond to the State, and give good security, for not less than four hundred, nor more than ten thousand dollars, conditioned that he will execute all process to him directed and delivered, and pay all moneys received by him upon the same, and in every respect discharge all the duties of constable according to law. The said bond shall be approved of by the court or clerk in vacation, and if taken by the clerk in vacation shall be approved of or rejected by the court at the next term."

By comparing the conditions of the bond sued on, with the condition given by the foregoing section of the statute, it will be found that they are substantially the same. The statutory condition does not appear to contemplate the insertion of the name of the township. There is in the commencement of the condition of the bond a recital made by the clerk, and in that is found the blank of which the defendant objects. This recital not being required by the statute, nor necessary to give validity to the bond, might well be dispensed with, without impairing the remedy of the plaintiff, or releasing the defendant from any just liability.

And although the constables are elected by the voters of their respective townships, their duties, as will be seen by reference to the seventh section of the act, are not confined exclusively to the townships electing them. Having general duties to perform co-extensive with the limits of the county, and for the failure of performing which, they might become liable on their bond, no necessity is apparent that the bond either in its obligatory part, or its condition, should designate the township which elected the defendant. It is sufficient to authorize him to act, that he has a certificate of his election.

It not being deemed important to the validity of the bond, that the name of the township should be given, supercedes the necessity of investigating the second point.

The other members of the court concurring herein, the judgment of the circuit court is reversed, and the cause remanded.

Rouse vs. Dean.

ROUSE vs. DEAN.

Under our statute, a mere entry upon land, and cutting timber, is not of itself sufficient to sustain an action of forcible entry and detainer.

APPEAL from Platte.

PETER H. BURNETT, for the Appellant, insists upon the following:

POINTS.

1. That the court erred in overruling the motion of the defendant to dismiss the suit.
2. That the court erred in giving the plaintiff's instructions.
3. That the court erred in refusing defendant's instructions.
4. That the court erred in overruling the motion for a new trial.

KIRTLY & REED, for Appellee.

McBRIDE, J., delivered the opinion of the court.

This was an action of forcible entry and detainer, brought before a justice of the peace, where the plaintiff having obtained a judgment, the defendant moved it into the circuit court by appeal, and the judgment being against him in that court, he has brought his case into this court by appeal from the judgment of the circuit court.

The evidence saved by the bill of exceptions shows, that the defendant having made an improvement on the public lands, in the fall of 1838, sold the same to Robert Shaw, for the sum of \$200, covenanting in writing under the penalty of \$1000, that he would use his utmost exertions to prove up a pre-emption to the land for the benefit of Shaw. Shaw took possession under his purchase, occupied it for a short time, when he sold to his brother, who shortly thereafter went to Kentucky on a visit, leaving Shaw in possession, with instructions to do what he thought best with the premises. In 1839, the public surveys were made in that district, when it was found that a portion of an improvement made by John Pace, would fall upon the quarter section, embracing the improvement in question. An arbitration was had between Shaw and Pace, by which it was agreed that Pace should occupy the field which he had made, for two years, with the privilege at the expiration of that period, to remove his rails enclosing the field, and after the public sales, that Pace should have 15 acres of the quar-

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ter section, so as to embrace his field, the line to run parallel with the line of the said quarter section, with the distinct understanding, that Pace was not to put a tenant on said strip of land. Afterwards, Reuben Arnold commenced an improvement on the same quarter section, and Shaw was compelled to pay him \$70 for the relinquishment of his right. Shaw having been thus harrassed by Pace and Arnold, and being threatened by the defendant that he would again go on the land, he in the absence of his brother, "to get shut of any further trouble, told the plaintiff to go on the place and hold it, and if he never was able to pay for it, that he, Shaw, would rather that it should be given to him, than that his brother should be rascled out of it."

On the 14th May, 1840, the plaintiff took possession of the place, and has resided there ever since—is a housekeeper and the head of a family. But about one month prior, the defendant, who is also a housekeeper, and the head of a family, also moved upon the same quarter section, and has resided there ever since.

A short time before the institution of this suit, the defendant said he had sold his right to the improvements to Shaw, and had no further claim, but that he intended to hold the land if he could. He cut timber on the quarter section, nearly midway from north to south. Notice was given him to leave, before the commencement of the action.

Such being the substance of the evidence, upon which the verdict was rendered, it is apparent that the defendant has acted in very bad faith, and that upon the merits of the case, he can never hope for any favor, from any jury of the country. Having once sold his interest for the sum of \$200—binding himself by his obligation under seal, "to use all endeavors in his power to obtain a pre-emption for the said Shaw," whose money he had pocketed, he is found a short time thereafter attempting by his wrongful and fraudulent act, to defeat the claim of Shaw. Under such circumstances, it is very great presumption in him, to expect that a jury who *will* look at "the very right of the case," will sustain him in his pretended claim.

On the trial in the circuit court, several instructions were asked on both sides, some of which were irrelevant, and others embraced mere abstract principles, and might have been given or refused, at the pleasure of the court, without the danger of influencing improperly the jury, and for the giving or refusing of which this court would not interfere. But the first one asked by the plaintiff, and given to the jury by the court, which goes to the right of the present form of the action, we feel constrained to notice. It is as follows:

"If the jury believe from the evidence, that the plaintiff was in the

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actual possession of the whole or part of the quarter section of land in controversy, and that defendant entered upon that part and cut wood or otherwise committed waste, without the consent and against the will of the plaintiff, they must find the defendant guilty, as to that part of the land."

The foregoing instruction assumes that the entry upon land, and the cutting of timber, constitutes a forcible entry and detainer, whereas the statute under the title of "Forcible entry and detainer," R. C. 277, declares that, "if any person shall enter upon or into any lands, tenements, or other possessions, and detain and hold the same with force or strong hand, or with weapons, or by breaking open the doors or windows, or other part of a house, whether any person be in it or not, or by threatening to kill, maim, or beat the party in possession, or by such words or actions as have a natural tendency to excite fear or apprehension of danger, or by putting out of doors, or by carrying away the goods of the party in possession, or by entering peaceably and then turning out by force, or frightening by threats or other circumstances of terror, the party out of possession, in such case the person so offending, shall be deemed guilty of forcible entry and detainer, within the meaning of this act."

The hypothesis in the instruction does not come within the definition of the act, and would not consequently subject the defendant to the proceedings had against him in this case—it would only constitute him a trespasser at most. We think therefore, that the instruction should not have been given; and the other members of the court concurring in reversing the judgment, it will be reversed and the cause remanded.

 COATES & BARTLEY vs. DAY & BENNETT.

A. as guardian of S. gave bond with B. & C. securities. Afterwards A. conveyed a tract of land to his son D. who sold the same to E. A. died. B. & C. his securities, paid a debt due by A. as guardian, without suit, and then filed a bill in equity against D. and E. to establish their demand against A's estate, to set aside the conveyance from A. to D. and from D. to E. as fraudulent, and to have the land sold to satisfy their demand. Held: That there must be an administrator of A's estate, and that he must be made a party.

ERROR to Callaway.

HARDIN & ANSELL, for Plaintiff in error.

Coates & Bartley vs. Day & Bennett.

JAMESON & SHELEY, for Defendants in error.

McBRIDE, J., delivered the opinion of the court.

Samuel Day on the 19th August, 1839, was by the county court of Callaway county appointed guardian of Mary Ann Smart, a minor, when John Coates and John Bartley became his security as such guardian. Between the time of Samuel Day's appointment, and his settlement with the court, which took place on the 18th November, 1841, there came to his hands and remained unexpended the sum of \$355 96. On the 3d January, 1842, Samuel Day and wife conveyed by deed to their son Patrick E. Day, all the real estate which they possessed. On the 30th September, 1842, Patrick E. Day mortgaged the land to Anson G. Bennett. On the 1st June, 1843, Samuel Day and wife made another deed for the same land to their son Patrick. Shortly thereafter, Samuel Day departed this life. On the 23d November, 1844, James K. Sheley was appointed by the county court curator for Mary Ann Smart, the late ward of Samuel Day. The complainants, securities of Samuel Day, being liable on their bond for the balance found in his hands, without suit, and to avoid costs, paid the same to the curator. The bill charges fraud in the conveyance from Samuel to Patrick E. Day, and from Patrick E. Day to Anson G. Bennett; and seeks, 1st, to establish complainant's demand against the estate of Samuel Day, deceased; 2d, to set aside the deed; and, 3d, to obtain a decree subjecting the land to the payment of their demand. To the bill a general demurrer was filed, which having been sustained, and judgment given thereon for the defendants, the complainants have brought the case here by writ of error. Several questions have been presented to this court by the complainant's solicitor, all of which it is not now necessary to discuss.

It is a general principle in chancery, that the bill must call all the necessary parties, however remotely concerned in interest, before the court, thereby enabling the court to do complete justice by deciding upon, and settling the rights of all persons interested in the subject of the suit. Samuel Day died before the filing of the bill, and it does not appear that administration has been granted upon his estate. He most likely left no estate, other than the land conveyed to his son; and although his administrator, if one was appointed, could take no steps to set aside the deeds for fraud, yet it would seem necessary before a demand can be established against his estate, that a representative authorized to resist the demand, if unjust, should be before the court.

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If the deed should be adjudged fraudulent, and the land when sold produce a surplus after paying the demand of complainants, other creditors, if there be any, and after them the distributees of Samuel Day, would be interested in seeing that the complainants obtain a judgment for only what is really due to them.

To obviate the above difficulty, the complainants are desirous, if practicable, to treat the defendants as executors *de son tort*. But the estate, if there be any, consists of land, and we know of no rule which will constitute a fraudulent grantee of real estate, an executor *de son tort*. Under our statute lands may be sold for the payment of debts, after the exhaustion of the personality, but it can only then be done by on order of the court. There can, therefore, be no executor *de son tort* of real estate.

The other judges concurring herein, the judgment on the demurrer in the circuit court is affirmed.

MASTON vs. FANNING.

1. Where the verdict and judgment are manifestly for the right party, they will not be set aside for the refusal of the court to give an instruction, when such refusal could not operate to the injury of the party asking the instruction.
2. A judgment will not be reversed for refusing to give an instruction, the substance of which has been given in another form.

ERROR to Platte.

ISAAC N. JONES, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. To entitle Fanning to recover in this action, he was bound to prove the commission of a trespass by Maston, and the amount of damages resulting therefrom. (2 Starkie's Evidence 802.)
2. That if Maston had a pre-emption right to the land at the time the timber was cut, he was not liable in this action. (See acts of Congress, 1838-40. Mo. Decisions, January Term 1845, Lewis vs. Lewis; 2 Star. Ev. 815.]
3. That a deed, patent, or Receiver's certificate, is no evidence of

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title being in the purchaser prior to their date. (8 Mass. 230, 239; 9 Mass. 307, 310; 12 Mass. 456, 463.)

4. That the purchase of the pre-emption claim from Ellsworth by Fanning, conferred no title to the land on Fanning. (See acts of Congress, 1838, 1840.)

5. That a pre-emption right was the only title which Fanning could have had to the land, at the time the timber was cut, and that Maston had a right to refer that title to the jury under the instruction of the court, as presented in the fourth refused instruction.

6. That the damages are excessive. The evidence showing that the principal part of the timber was cut by Fanning's consent, and that the value of the timber and damage done the land did not exceed \$100.

7. That the evidence in relation to the purchase of the claim by Fanning from Ellsworth, was illegal, and calculated to mislead the jury, and ought to have been rejected.

W. B. ALMOND, for Defendant in error.

POINTS.

The counsel for Fanning insists that the decision of the court herein is right, and should stand for the following reasons:

1. Fanning clearly shows himself by the testimony, and by the Receiver's receipt offered and read in evidence without objection, entitled to a pre-emption right under the act, 4th Sept. 1841, and that during the time he was so entitled, Maston cut and carried off the timber sued for.

2. The proof introduced by Maston to sustain his plea of license, amounts to nothing; it only shows that for sake of peace, Fanning agreed that Maston might cut and use and *improve* with the timber on the south-west quarter of said tract of land, *on* said land, but that by the plainest implication, the timber was not to be removed off the land. This clearly was no license to strip the south-west quarter of said tract of land of its most valuable timber, and haul it off to another tract. Besides, Maston cut timber on other parts of said tract of land, and moreover, Maston does not complain as to his instruction as to license, for that instruction was given to the jury, and they find against him on that issue.

3. To show clearly that Fanning was entitled to the *exclusive* pre-

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emption right on the land named in the declaration from the time he settled on it, to the commencement of the suit, the counsel for Fanning refers to the whole of the testimony given in the cause, and the act of Congress, "to distribute the proceeds of the sales of the public lands, and to grant pre-emption rights," approved Sept. 4th, 1841.

4. To show that Maston forfeited all right which he pretended to set up by pre-emption under the act of Congress of 1st June, 1840, by his sale and gift to Munn, Ellsworth and Fanning, as detailed in evidence, the counsel for Fanning refers to the affidavit required by said act, reviving the act of Congress of 22d June, 1838. And further, the testimony shows that Maston entered and paid for another and different tract of land, under the act of June 1st, 1840.

5. To show that trespass can be maintained on a pre-emption right, see Revised Code of 1835, p. 237.

McBRIDE, J., delivered the opinion of the court.

Joseph Fanning brought his action of trespass *quare clausum fregit*, against Matthias Maston,, to the October Term, 1844, of the Platte circuit court, at which time the defendant filed a plea of not guilty, and a special plea that he had license from the plaintiff. Issue having been taken, the parties went to trial before a jury, which resulted in a verdict in favor of the plaintiff, and an assessment of \$100 for his damages. The defendant filed his motion for a new trial, assigning the usual causes, which being overruled, he excepted to the opinion of the court, and now brings his case here by writ of error.

EVIDENCE IN THE BILL OF EXCEPTIONS.

Henry F. Howard, a witness on the part of the plaintiff, stated, that he was the step son of the plaintiff, that early in the year 1841, the plaintiff arrived in Platte county, a stranger, and shortly thereafter was taken sick and confined to his bed. The plaintiff had a large family, and wished to purchase a home for himself and family to live on; that he, plaintiff, heard that one Ellsworth had a good place to sell, but he heard at the same time that Maston, the defendant, claimed or had claimed it. Plaintiff being sick in bed, and unable to go himself, requested witness to go and see Ellsworth and his place. Witness went accordingly—saw Ellsworth and his place—was pleased with said place and the price, and went to see Maston, the defendant, also.

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Witness told Maston that Fanning had sent him to see said Maston ; that Fanning had heard that the Ellsworth place was for sale ; but that he had heard that Maston once claimed it by pre-emption, and lived on it, and Fanning wished to hear from him, Maston, and know all about it, before he would buy of Ellsworth. Maston then told witness that he had once lived on it, and had once claimed and held a pre-emption right thereon, but that he had abandoned it, and settled on the prairie quarter, where he was then living. That he did not like Ellsworth as a neighbor, and wished him out of the neighborhood—that he wished Fanning to buy said place of Ellsworth, for he, Maston, wished from what he had heard of him, to have Fanning for a neighbor. That one James Munn had a claim to the north half of the quarter section of land in the prairie, on which he, Maston, was living. That he, Maston, wished to buy out and extinguish said Munn's right to said north half, and that said prairie quarter was all he wanted—that is, Fanning, the plaintiff, would aid and assist him in effecting a compromise with said Munn, by which he, Maston, could buy out said Munn's interest in said north half of said prairie quarter, and by which said Munn would abandon and give up said north half to said Maston, then defendant agreed that he would give up all his interest to Fanning in the Ellsworth place, and quit and abandon it forever to him; and that he, Maston would pay him, witness, \$20 for his trouble and aid in effecting said compromise. Witness further stated that shortly thereafter, he and Fanning did by their efforts succeed in effecting a compromise between said Maston and Munn, in the way above indicated by said Maston, and that Munn relinquished and abandoned all of his right to the said north half of said prairie quarter section of land, and that Maston relinquished and abandoned forever all his right to the Ellsworth place to Fanning. The Ellsworth place is the same quarter section of land described in the declaration in this case, and is situated in Platte county, Missouri. The witness further states, that immediately after this the plaintiff bought said place of Ellsworth, and paid therefor the sum of \$300—erected a good dwelling house thereon—moved into and on it with his family, consisting of a wife and children, and has resided thereon as a house-keeper by personal residence, and made it his only home, from the time of his said settlement, which was some time in the year 1841, to the present time. That at the time of his said settlement, Fanning was a free white citizen of the United States, and over the age of twenty-one years, and the head of a family consisting of a wife and children. That he, Fanning, did not quit or abandon his home or his own land to make the settlement aforesaid, and that at the time of

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said settlement, Fanning was not owner nor proprietor of 320 acres of land in this or any other State or Territory; and that at the time of said settlement or since, said Fanning did not and has not owned any land any where except the quarter section named in the declaration, and that at the time of and previous to the settlement, the Indian title had been extinguished to said quarter section of land, and it had been surveyed by the government of the United States. Witness further states, that some time in the year 1844, said Fanning entered at the United States land office, at Plattsburgh, Mo., the quarter section of land named in the declaration, and before spoken of, under the act of Congress of 4th Sept., 1841, by virtue of his settlement aforesaid. Witness further stated, that the quarter section of land in dispute and named in the declaration, was and is principally valuable on account of the timber on it—it being near a large prairie where timber is and must be valuable; and that shortly after Fanning settled thereon, and during the years 1842 and '43, Maston with his hired hands cut down the most valuable timber trees, oaks, walnuts, hickory, and the other description of trees named in the declaration, on said quarter section of land, and carried and hauled them off the same, and converted them to his own use on another and different quarter section of land, to-wit: the one on the prairie, before spoken of. That most of said timber trees were cut down on and carried off the south-west quarter of the quarter in contest—but that a considerable number of the timber trees cut down and carried off as aforesaid were cut down on other parts of the quarter section named in the declaration. Witness states that Maston and his hands had made a complete destruction of the timber on the said south-west quarter of the land in dispute—witness had noticed closely, and often seen Maston and his hands cutting and hauling said timber off said land, and had often heard Fanning warn and notify him not to do so, and witness had examined the stumps, and the number of the trees taken from said land named in the declaration, and thinks the actual value of the timber cut down by said Maston and his hands, and carried off the land named in the declaration, after the settlement of the plaintiff thereon, and before the commencement of this suit, to be at least one hundred dollars, and he thinks the land was damaged thereby to the amount of two hundred dollars. Witness stated that he was acquainted with the value of timber in that neighborhood, and of the quality and quantity of the timber so cut by Maston and his hands, and carried off as aforesaid. Witness further stated that all the timber cut by said Maston and his hands on said land as aforesaid, was by said Maston and his hands hauled off and put on and used on the prairie

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quarter as aforesaid. Defendant Maston told him that he had entered the prairie quarter section at the United States land office at Plattsburgh; Mo., under the act of Congress of 1st June, 1840, granting pre-emption rights.

James —, a witness for the plaintiff, stated that he owned and had a claim to the south half of the quarter section now in dispute; and that he owned and had a claim to the north half of the quarter section of land lying north of the one now in contest, in the prairie, in the fall of 1840 or winter of 1841, and that at the same time Maston, the defendant, owned and had a claim to the other halves of the quarter section of land, by the witness first named; and that shortly after the time spoken of by Howard, a witness herein, when Howard conveyed the proposition of Maston to plaintiff, of quieting or procuring the quieting of witness, Munn's claim, to the north half of said quarter section of land, in the prairie, above spoken of, by a compromise; said Fanning did procure the quieting of witness, Munn's claim, to said north half of said prairie quarter, by a compromise, and paid \$5 to witness, Munn, out of his own pocket, for effecting the same, and witness gave up and abandoned said north half to Maston. Shortly after this, witness understood from Maston, that he abandoned and gave up to Fanning all his right and claim, to the quarter section of land in dispute, and Fanning thereupon bought said quarter section of land, (the one in dispute) of Ellsworth—paid him \$300 therefor, and went on forthwith to make improvements thereon, and has lived thereon ever since. Since the settlement of Fanning on the land as aforesaid, Maston had cut down and hauled off the timber to a great extent, not only on one forty acres of it, but elsewhere, and in his opinion, the lowest estimate of the value of said timber cut, is \$50, and if the land had been or was his, he would not have had said timber cut for \$100. He thought the cutting and hauling off said timber damaged the land \$100. He further stated that all the timber cut on said land by Maston, was hauled off by Maston, and put on his said prairie quarter—that some time after plaintiff had settled on the quarter section of land in dispute, under the purchase aforesaid—plaintiff had a difficulty with defendant, about cutting down and carrying timber off the same, and in Platte City, he heard said plaintiff and defendant have the understanding, and come to this agreement in relation thereto: In future plaintiff was to cut and use whatever timber he might choose on three forties or quarters of said quarter section of land, in improving the same, and if Maston could prove a pre-emption at the United States Land Office thereon, that he was to get Fanning's labor and timber thus

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used in improving, and that Maston was to cut and use whatever timber he might choose on the remaining or south-west quarter of the quarter section of land in dispute, in improving the same, and then if Fanning could prove a pre-emption right thereto, at the U. States Land Office, Fanning was to get Maston's labor and the timber cut and used as aforesaid, and both parties were to abide by this agreement till the decision of the case, and the entry of the land at the United States Land Office as aforesaid. That some time before Peter H. Ellsworth, built his house and settled on the quarter section of land in dispute, Maston told him, witness, that said Ellsworth might now build on said quarter section of land, the pre-emption law had passed, and that he, Maston, could hold the whole of the prairie quarter, or half of it, and half of the one in dispute, but that said Peter was not present at this conversation.

The plaintiff then read the Receiver's certificate No. 3532, dated 8th Oct. 1844, for the north-east qr. of S. 36, T. 53; R. 34, at \$1 25 per acre, under act of 1841.

Peter H. Ellsworth, a witness for plaintiff, stated that in the summer of 1840, and after the 1st June of that year, Maston, the defendant, told him that Ellsworth might go on to the quarter section of land in dispute, and have it, and do with it what he pleased, that he, Maston, was going on to the prairie quarter, (the same spoken of by Munn,) that the pre-emption law had passed to suit him, Maston. He went on said quarter accordingly, erected a good dwelling house, and made other improvements thereon, and resided thereon with his family. Shortly after moving on said land, he sold his claim and improvement thereon to one Woody, who moved on and took possession of the same, who shortly thereafter sold to his, Ellsworth's, father, who sold to Fanning for \$300—that whilst he and Woody, or his father, owned said claim and improvements as aforesaid, Maston, never to his knowledge or information, asserted any right or claim to the same, except as detailed by Howard, another witness herein.

The defendant then introduced Peter H. Ellsworth, as a witness, who stated that he came to the neighborhood of the land in dispute, in the spring of 1840, and that the defendant was then living on the quarter section of land in dispute. That said Maston was the head of a family, consisting of a wife and children, and witness thinks that defendant continued to reside on said land till the winter of 1840 or 1841, but cannot state positively that defendant was living on the land described in the declaration, on the 1st June, 1840, but believes he was.

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Defendant then introduced ——— Hewitt, a witness, who stated that some time after Fanning had settled on the land in dispute, he heard a conversation between plaintiff and defendant, in which both agreed that there was an agreement between them to this effect, that is to say, Maston was to cut and use the timber on the s. w. qr. of the tract of land named in the declaration, till the land should be entered, and that Fanning was to cut and use the timber on three other quarters of the said quarter, till the land should be entered.

The court, of its own accord, and in lieu of the instructions asked by plaintiff, gave the following instructions: "The court intruct the jury, that although the defendant may have had a pre-emption right to the land on which the timber was cut, under the act of 1840, yet if the defendant gave up all his claim to Ellsworth to said claim, and abandoned the same without any intention of setting up his pre-emption claim thereto, and that plaintiff bought the claim of Ellsworth, or any person holding under Ellsworth, and that plaintiff was a free white person and the head of a family, of age—a citizen of the United States, and had the actual possession of the same, by residing thereon, in the year 1841, and that defendant cut down and carried off timber from said land, whilst the plaintiff had the possession of the same, they will find for the plaintiff, unless they believe the defendant had permission from the plaintiff to do so."

The defendant asked and obtained the following instructions :

1. If the jury believe from the evidence, that the title to the quarter section of land mentioned in the declaration, was in the United States, the first day of June, A. D. 1840, and that the defendant was a free white male citizen of the United States, over twenty-one years of age, on the said 1st June, 1840, and a settler by actual personal residence, and a householder on said quarter section of land, on the said 1st June, 1840—then the defendant had a pre-emption right to the said quarter section of land.

2. That if they believe from the evidence, that the defendant had a pre-emption right to the said quarter section of land, as defined in the preceding instruction, at the time of the cutting of the timber mentioned, then they must find for the defendant.

3. If they believe from the evidence, that Maston had leave from the plaintiff to cut the timber when he did, then they must find for the defendant.

Instructions asked by defendant and refused.

1. Before the plaintiff can recover in this action, he must prove the

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commission of a trespass by the defendant, and the amount of damage resulting therefrom.

2. That if the jury believe from the evidence, that the defendant had a pre-emption on the quarter from which the timber was cut, then the defendant was not guilty of a trespass in cutting the timber, and they must find a verdict for him.

3. They must disregard all the evidence introduced in regard to Maston's relinquishment of his right to the quarter section from which the timber was cut, as there is no proof that the relinquishment was in writing.

4. That the certificate of entry, issued by the Receiver of the United States Land Office, which has been read in evidence by the plaintiff, conveyed no title to the said quarter section of land, prior to the time said certificate issued.

5. That unless they believe from the evidence, that the title to the said quarter section of land was in the United States, and that the plaintiff had erected a dwelling house on it, and had inhabited the same, and was a free white male citizen of the United States, over the age of 21 years, at the time the trespasses in the declaration mentioned were committed—then they must find for the defendant.

It is assigned for error, that the court permitted illegal evidence to go to the jury—the court erred in giving the plaintiff's instruction, and in not giving a portion of those asked by defendant, and in refusing a new trial.

In reviewing the evidence saved by the bill of exceptions, we are not able to discover any objection of sufficient importance to induce the setting aside the judgment. If we correctly understand the objection, it is that the witnesses testified of and concerning a sale of the improvements, or the right of pre-emption on the land upon which the trespass was committed. This could not well be avoided, and was perhaps necessary to enable the jury to arrive at the conclusion whether or not the defendant had after his sale, abandoned his right to a pre-emption on the land. In all trials of this character, it is well enough to have before the jury all the attendant circumstances, thereby the better to enable them to do full and complete justice between the parties.

That portion of the instruction given by the court at the instance of the plaintiff, which refers to the defendant's prior claim to a pre-emption—his transfer or abandonment of that claim, and the purchase made by the plaintiff, might have been omitted, as no title inured thereby to him. But still we do not think that it was calculated to mis-

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lead the jury, especially, when from an examination of the evidence, we find there was abundance to authorize the finding of the jury.

The first instruction asked by the defendant, and refused by the court, had been virtually given in the one given by the court for the plaintiff.

The second one refused, was given, almost word for word, in the second one given by the court, at the instance of the defendant, and there was no reason for giving it a second time,

The third refused, was predicated on a misapprehension of the law, there being no necessity for such a transfer being evidenced by writing. 4. Mo. Rep. 235, and the authorities there cited.

The fourth refused, was not important or necessary to the decision of the cause, as the trespass complained of, was committed prior to the entry at the land office, and the plaintiff's right to an action was predicated on his claim to a pre-emption under the act of Congress.

The fifth refused, had been before given, except as to the erection of a dwelling house by the plaintiff on the land. This is one of the requisites of the act of Congress, and it was in evidence, that the plain- had fully complied with that, as well as the other provisions of the law to entitle him to a pre-emption on the land, and the certificate of the Receiver of the Land Office, further shows that fact. The question then arises, shall this court reverse the judgment of the circuit court for this omission, which was no doubt occasioned by the hurry and confusion attending trials in the circuit court? We are satisfied that substantial justice does not require the reversal of the judgment in this case, nor do we think that sound policy dictates such a course. It is a vexatious case, and has no doubt been the source of embittered feelings between the parties litigant, and however anxious they may be to prosecute it further, this court has no disposition to indulge them.

Judge NAPTON concurring herein, the judgment of the circuit court is affirmed.

SCOTT, J., dissents.

FRESH vs. MILLION.

1. A. to secure a debt due to B. executed a deed conveying certain lands in trust to C. C. died leaving heirs. In a bill filed to have a new trustee appointed, and the land sold to satisfy the trust, the heirs of C. are necessary parties.

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2. The deed of trust being given, upon a condition and consideration not expressed in the deed, on a bill filed to have a trustee appointed, and the land sold, a court of equity will require the complainant to do equity, and if he have refused to comply with the condition upon which the deed was executed, equity will not lend its aid to enforce his rights.

APPEAL from Ralls.

GLOVER & CAMPBELL, for Appellant.

POINTS AND AUTHORITIES.

1. By the death of Samuel Allen, the lands conveyed to him descended upon his heirs, and they were necessary parties to the complainant's bill. If so, no decree could lawfully be entered for the sale of said land until all of said heirs were before the court, and the same reasons demand that Glover & Anderson, the subsequent mortgagees, should have been made parties; 1 Tucker's Com. part 2, p. 130; 6 John. Ch. R. 450; 1 Ib. 350; 2 Tucker, 496; 4 John. R. 606; 7 Monroe, 496. The decree must be reversed for want of parties, 2 Dana, 388; 1 Dana, 594; 6 Mon. 43.

2. The record shows there were two guardians in the case for the infant heirs of Samuel Allen, deceased: William Holmes and James S. Green. If Holmes is to be regarded as the guardian, then there is error, because there was no order taking the bill for confessed against said Holmes *as guardian*; and if Green is to be considered guardian, the objection is that he was appointed by the court, and without process served upon said infant defendants, so there is error in either view of the subject. 5 Dana, 584; 3 Dana, 216; Ib. 405, 300; 1 Tucker, 2 part 106; Story Eq. Pl. 189; 5 J. J. Marshall, 49.

3. The conduct of Million in procuring Fresh to execute the deed to him, by the promise of releasing him as security to Samuel Allen, and his refusal to do so afterwards, was iniquitous and oppressive; and when he comes into a court of equity seeking relief, he will be required to do equity, or his bill will be dismissed; 22 Pickering, 312; 1 Brown Ch. C. 546; 2 J. J. Marshall, 405; 1 Marsh. 210; 3 Bibb, 298; 3 Harris & McH. 327; 3 Monroe 329; 2 Tucker Com. 464; 2 Ib. 395; Fonblanque's Eq. 283, top page; 2 Cowes, 195; 3 Peter's, 219; 1 Vesey, 199; 2 Vernon's R. 602. In the American Chancery Digest, vol. 1, 455, No. 44, it is laid down, that "In a court of equity, fraud includes all acts, omissions and concealments, which involve a breach of either legal or equitable duty, trust or confidence justly reposed, and are injurious

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to another, or by which an *injurious* or *unconscientious* advantage is taken. Equity considers a parol agreement for the sale of lands, as binding in conscience, and will not decree in opposition to it." 1st American Chy. Dig. 415, No. 15, (citing 1 A. K. Marsh. 437.)

4. The \$80 paid in 1836, and the \$63 which Million owed to Fresh on account, and which Million contends in his answer was paid to him, should have been credited on the debt of Million. 5 Dana, 81; 7th Mar. 596; 3 Dana, 595. But if these items were not good as payments, most certainly they should have been allowed as off-sets. 3 Monroe, 82; 3 Ib. 87; 2nd Summer, 151; 3 Mason, 140, 145; 2 Cowen, 175; 2 Tucker Com. 395; 2 Pull. Dig. 283, No. 203, citing 5 Mon. 63; Durretts vs. Hook, 8 vol. Mo. Rep. 381. A bill to foreclose a mortgage is a bill for an account, 1 Calvert's Eq. 125; 7 vol. Law Lib.; see Ibidem 211, where a bill for an account is held to be a bill for the execution of a trust.

5. The excessive interest will be deducted of course, according to the Statute; see Revised Code 1835, 334. An agreement for 25 per cent. is not a good agreement for 10 per cent. The agreement for 25 per cent. being void, the case stands as if no interest had been stipulated for. In such case 6 per cent. is regarded as legal, and the excess to be deducted.

RECAPITULATION.

The appellant insists that the decree of the circuit court must be reversed for want of necessary parties, and because the appellee is not in a condition to ask the aid of a court of equity. But in no event can a decree now be made more unfavorable to him than to allow the following items against the money lent—\$80 paid in 1836; \$63 the goods sold complainant; and \$76 the excessive interest contracted for; in all \$219; this deducted from \$400 leaves \$181, to which the appellee is entitled, unless as argued, the court could deny him relief, till he will do equity touching the alleged fraud practiced upon the appellant.

LEONARD & BAY, for Appellee.

POINTS AND AUTHORITIES.

First, The circuit court did not decide upon the objection of the want of the service of process upon a portion of Allen's heirs, and therefore

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that question cannot be raised in this court by Fresh upon his appeal. *Chamley vs. Dunsany and others*, 2 Schoale & Lefroy, 712; *Colden vs. Knickerbocker*, 2 Cowen 49; *Campbell vs. Starkes*, 2 Wendell's R. 143; *Sands vs. Hildreth*, 12 John. Rep. 490.

Second, The alleged conduct of the complainant in procuring the deed, furnishes no ground for refusing to the complainant the relief sought, if he were otherwise entitled to it, because,

1st, The proof does not sustain the allegations in point of fact;

2d, If the facts be as alleged they constitute no equity for the refusal of the circuit court to appoint a new trustee in the room of the one displaced by death. *Neilson vs. McDonald*, 6 John. C. R. 201.

Third, The eighty dollar and the sixty-three dollar payments, were voluntarily made by Fresh in discharge of usurious interest he had agreed to pay; and having been so made, he cannot recover the money or any part back, under our usury laws. Rev. Laws Mo., title, "Interest," § 4, p. 333. *Livingston vs. Harris*, 3 Paige's Rep. 532.

Fourth, The decree of the circuit court was for a less amount than the complainant was entitled to under any view that could be taken of our usury laws, as administered in a court of equity.

1st, A court of equity is not within the meaning of our usury laws, so far as those laws inflict upon the lender the penalty of a forfeiture of all interest and as much of the principal as the premium exceeds lawful interest, and therefore the decree ought to have been for \$400 (principal lent, with six per cent. interest from February 1839, (time of the last loan,) to October, 1843, (time of the decree,) in all \$514, instead of \$324.

2d, If, however, the penalty is to be enforced in all cases whenever a suit is brought, whether at law or in equity, or whether directly on the contract for the repayment of the money, or in equity, to supply some defect in the security given for the money loaned, then the decree ought to have been for \$400 less \$60, (the excess of \$100, the premium exacted over \$40 lawful interest,) that is for \$340 instead of \$324.

NAPTON, J., delivered the opinion of the court.

This was a bill in chancery brought by Daniel A. Million against James Fresh. The bill charges that the defendant James Fresh, was on the 30th day of January, 1838, indebted to the complainant in the sum of five hundred dollars, for which sum he executed his note payable

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on the 30th January, 1839; that to secure the payment of said note, said Fresh executed for the benefit of complainant, a deed of trust for a certain tract of land described in the bill, and that one Samuel Allen was made the trustee, with the power of selling said land upon ten days notice, and applying the proceeds to the satisfaction of the debt. That before the money became due, Allen the trustee, died, leaving nine children, five of whom are adults, and four minors; that W. H. Holmes is guardian of said minors, and administrator of the estate of the deceased. The bill further alleges that the money is still unpaid, and prays the appointment of a trustee to carry out the purposes of the trust. The heirs of Allen are made parties defendants.

A summons was issued for the heirs of Samuel Allen, deceased, and the guardian of the minor heirs. This summons was served upon Fresh and some of the adults, two of them being returned not found.

The answer of Fresh admitted the execution of the deed of trust, but denied the extent of indebtedness claimed by Million. The answer states the transaction out of which the deed of trust originated, to have been as follows: In the year 1835, complainant loaned to defendant the sum of \$400, upon which sum defendant agreed to pay 20 per cent. interest per annum; defendant then executed his notes to complainant for \$400, the principal, and for \$80, the amount of usurious interest, each note being payable twelve months after date; that defendant paid the last note when it became due. That after the expiration of the first year, the loan was continued for another year upon the same terms, and an endorsement was made upon the bond to that effect. At the end of the second year defendant executed his note to complainant for \$80, the amount of interest agreed upon for the past year, and complainant then insisted on 25 per cent. per annum for the ensuing year. The defendant being pressed for money, acceded to the terms proposed, and executed his bond or note to complainant for \$500, which included the original debt of \$400, and the interest for one year at 25 per cent.

The defendant further avers in his answer that complainant offered to release him from his liability as security for Samuel Allen, in a note given by said Allen to complainant for \$300, if he would give a deed of trust to secure the payment of the said \$500; that he executed the deed of trust referred to by complainant upon this consideration; that complainant refused to release him as security for said Allen, but sued defendant on said bond, and compelled him to pay the full amount thereof, said Allen, the principal, being insolvent.

The defendant further stated, that soon after the execution of said bond for \$500, complainant, at his own instance, made an endorsement

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on the bond, stating, that if the principal sum due, should be paid before the same became due, he would release the usury contained therein, but that complainant knew at the time such endorsement was made that the defendant, on account of pecuniary losses, would be unable to pay the bond when the same should become due.

The defendant then alleges that the complainant is justly indebted to him in the sum of \$80 for usurious interest on the loan for \$400 paid in 1836, and in the sum of \$63 for goods, &c., and prays that these sums may be set off against the lawful demands of the complainant. Defendant insists on the protection of the statute against usury.

Afterwards the defendant filed a cross-bill, in which he prayed that his answer heretofore made, might be considered a cross-bill. To this was appended fourteen interrogatories, relating to the charges of usury contained in the answer.

To this cross-bill complainant demurred, but the demurrer being overruled, complainant filed his answer, in which he admitted the principal facts charged by the defendant in relation to the usury. In relation to the deed of trust, the complainant says: "Defendant further states that for the consideration of the deed of trust, I would release him from the securityship of Samuel Allen. Samuel Allen was then approaching bankruptcy, but I promised if he would give me a deed of trust that was satisfactory, I would release the defendant. Allen learning from me, as I was required to inform him, of the intention of his security, promised to do so at the same time and place, and he appeared there that day, but politely refused to give up land, alleging that he would borrow the money if it cost him 30 per cent. to take in his note, seeming very much affected at the intimation I had presented him from the defendant, though in a polite and friendly manner."

The complainant denied that there was any usury in the note for \$500, but stated that the sum of 100, included in the note for \$500, was intended as a penalty to induce the defendant to pay the principal.

Upon the hearing the complainant filed as an exhibit in the cause, the note for \$500, upon which was an endorsement, by which the complainant agreed to deduct the interest, in case the principal was paid before due.

The deposition of one Barr was read, in which Barr stated, that in a conversation with Million, the complainant, in relation to the transfer of a note due from witness to Allen, to said Million, the complainant said that Allen was not the man he took him to be, that he was not honest; that he had loaned Allen money, with Fresh as his security, and he had loaned Fresh money with Allen for security; that he had

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agreed to release each security, if they would each confess judgment. Allen had confessed judgment, as complainant informed witness, but had not acted correctly in transferring all his debts; and that he, Allen, knew that he had released his security, and did not care whether he got his debt or not. Fresh, the complainant stated, would not confess judgment, but had given him landed security under the same agreement.

William Fresh, another witness, who was present at the execution of the deed of trust made by Fresh for Million's benefit, stated that after the execution of the deed and bond, Million passed the old note for \$400 to Fresh, and Fresh put it into the fire, observing, "now, Allen, we stand each upon our own footing—no longer responsible for each other." Thereupon Million observed, "well, we'll arrange Mr. Allen's business to-morrow."

The circuit court decreed, that so much of the answer and cross-bill of the defendant Fresh, as relates to the mortgage to Anderson and Glover, and so much thereof as seeks to set-off certain debts alleged to be due from said Million to said Fresh, be dismissed, and as to the other matters in the said original bill of complaint, and in said answer and cross-bill contained, the court finds that the actual amount of money loaned by said complainant to said Fresh, and which formed the consideration of the said note of five hundred dollars, was four hundred dollars, and that the remaining one hundred dollars was interest agreed to be paid by said defendant to complainant, and therefore decrees that the sum of seventy-six dollars, the amount of usurious interest on said note, be deducted from the sum of four hundred dollars, leaving a balance of \$324, and that the said balance of \$324 be paid to complainant, Million, together with the costs of suit, and that so much of the mortgaged land be sold as will raise money enough to pay the same.

The first objection to this decree is the want of service upon two of the heirs of Samuel Allen, deceased, who were necessarily parties to the bill. This objection is conceded to be a substantial one; but it is insisted in this court, that inasmuch as the objection was not made in the circuit court, it is too late to make it here for the first time, our statute declaring that this court shall only decide upon such points as were decided by the inferior court.

In common law actions, where the defendant objects to any step or proceeding in the cause, previous to the judgment, which proceeding appears upon the face of the record, he must move in arrest of judgment; and without such motion, the error, if any has been committed, cannot be corrected by the Supreme Court. *Davidson vs. Peck*, 4 Mo. R. 446. But where the judgment itself is erroneous, as where the ac-

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tion is assumpsit, and the judgment is in trover, or where the action is against an administrator, and the judgment is *de bonis propriis*, such erroneous judgments have been corrected upon writ of error. State of Missouri to the use of Estiss vs. Finney, admr. of McAllister, 9 Mo. R. Such also appears to be the practice of the court of errors of New York. In the case of Palmer vs. Lorillard, the plaintiff who had shipped goods in the vessel of the defendants, brought an action of assumpsit against the ship owners, and averred a loss of the goods by negligence. The jury found a special verdict, that the goods were lost under particular circumstances, detailing them, without any fault or negligence of the defendants. The court entered a judgment upon the special verdict for the plaintiffs. The court of errors reversed this judgment, and held, that admitting that the plaintiffs had a cause of action, yet they could not recover under this declaration, the jury having negatived the negligence of the defendants, which was the *gravamen* of the action. In relation to the want of objection to this judgment, in the inferior court, Chancellor Kent remarks; "Nor do I think that this case comes within the rule that an objection not taken in the court below, cannot be taken here. That rule was only intended to be applied to objections that the party may be deemed by his silence to have waived, and which, when waived, still leave the merits of the case to rest with the judgment. But if the foundation of the action has manifestly failed, we cannot, without shocking the common sense of justice, allow a recovery to stand. Suppose the declaration in this case had been for assault and battery, or for slander, and the jury had found the defendant not guilty, but had further found that the defendant owed the plaintiff on a promissory note, could we have affirmed a judgment for the sum due on the note? This would be too great an absurdity to be endured.

In the case now under consideration, the decree of the court is for the sale of land, and a sale made under the decree, it is obvious would not affect the title of the heirs of Allen, who were not served with process. The tendency of such a proceeding, must be to produce a sacrifice of the property of Fresh. If the objection affected only the rights of the complainants, ineffectual as it might be to convey the whole legal title, and the complainant consented, the case might be different. As it is, if the decree were in other respects correct, we should feel it our duty to send the case back, for the purpose of having all the necessary parties before the court.

But we think the decree is erroneous on the merits. The complainant asks the aid of the court to enforce a lien, which, according to the

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statements of the defendant was obtained by fraud or contrivance, or at least upon a consideration which entirely failed. No principle of equity is better settled than that a court of chancery will not interfere to aid a plaintiff under such circumstances. The only question is, whether the defendant has made out his case. The defendant in his answer alleges that this deed of trust was given upon the agreement of the complainant that he would release the defendant from his liability as security for Samuel Allen. This, it is admitted, he never did, but recovered a judgment against Fresh and Allen, and made the whole money out of Fresh. The complainant, though not specially interrogated on this point, volunteers an answer, and this answer, if intelligible at all, is most unsatisfactory and evasive. His language is this: "Samuel Allen was then approaching bankruptcy, but I promised if he would give me a deed of trust that was satisfactory, I would release the defendant." To whom was this promise made—to the defendant or S. Allen? The construction of the sentence would imply it was made to Allen. If so it is no answer at all to the defendant's charge. But if it were intended that the promise was made to the defendant, the inquiry then arises, by whom does the complainant mean that the deed of trust was to be given, by Allen the defendant? The statement of the complainant would seem to intimate that the deed of trust was to be given by Allen. If so, it is a mere evasion of the charge made by the defendant, which is neither admitted nor denied.

The statement of the defendant, uncontradicted as it is by the complainant, is strongly corroborated by the two witnesses whose evidence is detailed in the statement of the case. Barr states that Million complained to him of the dishonesty of Allen, in not transferring to him a debt which Allen owed to the witness, and that he had discharged Fresh from his responsibility for Allen's debt; that Allen and Fresh had each been indebted to him, and each security for the other; that he had agreed to discharge each from this responsibility for the others debt, if each would confess a judgment; that Allen had confessed judgment, and Fresh had executed a deed of trust under the same agreement.

The evidence of William Fresh is also confirmatory of this understanding. This witness was present when the deed of trust was executed, and Fresh distinctly declares in the presence and hearing of the complainant, that he and Allen were no longer responsible for each other. To this, complainant makes no observation, except "that he would attend to Allen's business to-morrow."

From the statements of the parties, and the evidence above detailed we must infer that this deed of trust was obtained under a promise on

Groom vs. Hill.

the part of the complainant which was never complied with. Will a court of equity lend its aid to the enforcement of a deed so obtained? We think not. The decree of the circuit court is therefore reversed, and this court doth order, adjudge and decree, that the complainant's bill be dismissed.

GROOM vs. HILL.

1. An application to a Register, and a deposit of money with him, in the absence of the Receiver, can give no right in law or equity, to the land applied for.
2. Of two certificates of entry, no patent being issued on either, the oldest will hold the land, there being no evidence of fraud, illegality, or irregularity in the entry.
3. Evidence that the Commissioner of the General Land Office had cancelled the first entry, no patent being issued on the second, will not affect the right of the party claiming under the oldest entry.

ERROR to Montgomery.

WRIGHT, for the plaintiff in error.

POINTS.

1. That if the record of former recovery was not good under the issue of *nul tiel*—yet that it was good evidence under the general issue, and might thus constitute a good defence to the second count, and consequently a good bar to the whole action, since the defendant below was found not guilty under the first count.

2. The motion for a new trial ought to have been sustained—because the bill of exceptions does not state that the plaintiff below, *introduced* any evidence showing in himself a legal right to the possession of the premises mentioned in either count—but only that “he offered in evidence” a Receiver’s receipt for the land described in the second count. For aught that appears, it was not actually read as evidence in the cause.

3. But if it were actually introduced and read in evidence, it furnishes no evidence of the legal right of possession in the plaintiff below, to the land described in it. The patent certificate of the Register, is the only legal evidence of the purchase from the government, except the patent.

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4. The better evidence of title—of legal right to the possession of the premises, was shown to be in the defendant below. He was in possession, and that is good, if I be right in my last position; and if I am wrong in that, he was the first applicant, and as such, was entitled to the land.

CARTY WELLS, for the Defendant in error.

NAPTON, J. delivered the opinion of the court.

This was an action of ejectment, brought by Hill, the defendant in error, to recover possession of a tract of land in Montgomery county. The declaration contained two counts; in the first, the plaintiff claimed the east half of the n. w. qr. of S. 32, T. 47, R. 5, and in the second count he claimed 40 acres, part of the 80 acre tract in the first count mentioned. The defendant pleaded the general issue, and also the plea of former recovery. To the plea of former recovery, the plaintiff replied *nul tiel record*. Upon the trial of the issues, the defendant, to support his plea of former recovery, offered in evidence the record of a former suit between the same parties, concerning the 40 acre tract mentioned in the second count of the declaration, which record, as we learn from the bill of exceptions, was rejected, because of variance. Upon the general issue, the plaintiff offered in evidence, the Receiver's receipt for the east half of the n. w. qr. of S. 32, T. 47, R. 5. The defendant then submitted proof, showing that on the first of February, 1833, he sent an agent to St. Louis to enter the 40 acre tract described in the second count of the declaration; that said agent applied to the Register to enter said tract, but was informed that it could not be entered, as there was at that time a vacancy in the office of Receiver, but that he might leave his money with him until a Receiver was appointed. This was accordingly done. During the month of August following, hearing of the appointment of a Receiver, the defendant again sent his agent to St. Louis for the purpose of entering the land, but it was discovered that plaintiff had in the mean time entered it. The Register, however, informed the defendant's agent, that he would write to the Commissioner of the General Land Office, and have Hill's entry cancelled. A correspondence between the said Commissioner and the officers at St. Louis, was then read in evidence, from which it seemed that the Commissioner had in fact vacated Hill's entry, and directed the land officers to allow Groom to enter, and ordered Hill's money to be repaid. The money was tendered to Hill, but declined. Groom's receipt was dated 16th August, 1833.

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The court, the parties having dispensed with a jury, found the issues for the plaintiff, Hill, and rendered judgment accordingly. No instructions were asked, or rather the court was not called upon to decide any point of law. There was a motion for a new trial, which was overruled.

The plea of former recovery, is so essentially defective, that we conceive the determination of the issue arising out of that plea, to be immaterial. The plea only averred a judgment for costs, and the record produced, showed nothing more.

Waiving the point of practice about which the counsel have been silent, we are clearly of opinion that the finding of the court upon the general issue, assuming the facts to have been as the evidence seemed to establish, was in accordance with the law.

The application of Groom in February, 1833, at the Land Office—his deposit of the money with the Register, and the memorandum made by the Register of these facts, we consider entirely out of the case. Such application confers no title either in law or equity. No sale of the land could take place in the absence of a Receiver, and the action of the Register in receiving the money, and taking a note of the time of its receipt, was entirely unofficial. *Matthews vs. Zane*, 7 *Whea. R.* 164.

The question is then narrowed down to the relative value of an entry made in March, 1833, and a subsequent entry of the same land in the following August, no patent being issued in either case, and no imputation of fraud on either transaction. Both titles being of equal dignity; the one prior in time must prevail.

As to the proceedings at Washington, subsequent to the sale of the land to Hill, in which it seems, the Commissioner of the General Land Office, undertook to vacate the entry and authorized the return of the purchase money, it is not perceived how those proceedings, admitting them to have been properly authenticated, and duly authorized by law, could affect the merits of Hill's title. If Hill's entry was illegal or void, that fact would be shown, but it must be shown to the satisfaction of the court, in which the action is pending. It is probably the duty of the Commissioner to revise the proceedings of the Register and Receiver, and vacate entries which may have been illegally made, and thereby arrest the completion of the title originating in fraud, mistake, or in violation of law, but until his action assumes a shape recognized by law, it cannot affect the previous sale. That sale stands for what it was worth, at the time it was made, and cannot be vitiated or annulled by any subsequent *ex-parte* proceedings of the officers, provided it was

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legal and valid at the time it was made; and of its legality and validity, the courts must necessarily be the judges.

It will be perceived, that no opinion is intended to be expressed in relation to a case where the United States issue a patent to one for a tract of land previously sold by the Register and Receiver to another. In the present case, the title still remains in the United States, and two individuals have obtained evidences of title to the same tract of land, of the same dignity, and all that is intended to be decided, is, that in the absence of all proof showing any fraud, or illegality, or irregularity, in the oldest entry, that must prevail over a subsequent entry. The United States in this particular, is like any other land proprietor; and if A. give a deed for a piece of land to B. to-day, and to-morrow convey the same land to C. it would hardly be contended in an action of ejectment, brought by B. against C., that A's. action in granting the land to C. could at all invalidate the title of B. If the first deed to B. were made by A., under duress, or procured by fraud, or made during his infancy, these facts could be shown, but the mere fact that A. on the next day, attempted to convey the same land to another, would be no evidence to impeach the validity of the first deed.

Judgment affirmed.

HARROLD AND WIFE vs. SIMONDS & BAILEY.

1. Under the acts of February 1, 1817, and December 6, 1821, requiring certain deeds to be recorded within three months, it is sufficient if they were filed for record in that time.
2. A confirmation of land by law is equivalent to a patent. And after confirmation is made, the United States cannot divest the title by giving a patent to another.

APPEAL from Lincoln.

CARTY WELLS, for the Appellants.

POINTS.

1. The confirmation to Woods of his grant according to the survey, gave him a complete title to all the land within said survey. See 2 Howard, Stoddard vs. Chambers.

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2. The deed from Woods to appellants being filed for record, within three months from its date, was a sufficient recording under the statute, although not actually copied on the record for several days after the expiration of the three months. And being recorded, passed the title from its date. And being older than Collier's mortgage, must prevail over it; and again,

There is no evidence that the patents cover the land in question.

3. The mortgage cannot be set up as a bar in this action.

4. The sheriff's deed conveys no title, because there is no evidence that the land was ever lawfully levied on, advertised and sold as required by statute.

BATES, for the Appellees.

POINTS.

1. I submit that the deed of gift was not operative in this action, because it was not recorded in lawful time. Whereas the mortgage to Collier, and under which he purchased, was recorded in proper time.

2. The patents to Collier prove a better title outstanding, than the title shown by the plaintiff. And so, the plaintiffs cannot recover in ejectment; but if they have suffered any wrong, must seek redress in chancery.

NAPTON, J. delivered the opinion of the court.

This was an action of ejectment to recover a small tract of land, lying in Lincoln county, of which the defendants had possession.

The evidence of the plaintiff's title, consisted of,

1. A confirmation by the board of commissioners, in 1810, of the claim of Zadock Woods to 400 arpens, founded on a concession from C. D. Delassys, in 1799, and a survey of the same, made on the 21st Dec., 1803, and certified the 20th Jan., 1804.

2. A plat and certificate of survey made by Antoine Soulard in 1804.

3. A deed from Z. Woods and wife to Minerva Harrold, dated Jan. 2, 1822, filed for record April 1, 1822, and recorded on the 5th of the same month and year. The Spanish survey contains, as appears from the bill of exceptions 379 90-100 acres, and the United States survey of the same tract contains 340 28-100 acres, the United States survey- or having thrown off from the Spanish survey twenty rods on the north line. In other words, the northern line of the United States survey

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runs twenty rods south of, and parallel with, the northern line of the Spanish survey. The deed from Woods to M. Harrold, embraces the land lying between these lines.

The defendants relied on two patents from the United States to George Collier, dated Dec. 1, 1825; and covering a part of the land in controversy; and secondly, upon a mortgage of the same land from Z. Woods to George Collier, a foreclosure of the same, and a sheriff's sale to Collier under the foreclosure. The mortgage was executed 11th Jan., 1822, and recorded 7th Feb., 1822.

The court instructed the jury at the instance of the defendants, that if the deed of mortgage was dated on the 11th January, 1822, and recorded on the 9th Feb., 1822, and the deed to Minerva Harrold was dated on the 2d January, 1822, and not recorded until the 5th of April, 1822, the deed to Collier conveyed the title.

The plaintiff took a non-suit and moved to set it aside, which was overruled, and the case is brought here by appeal.

The principal question arising in this case, is the one which springs from the instruction given by the circuit court, and this depends entirely upon the act of February 1, 1817, and the act of December 6, 1821, which was the law regulating conveyances at the time of this transaction.

The second section of the act of Feb. 1, 1817, provides that all deeds, conveyances, &c., shall be recorded in the county wherein the lands lie, within three months from the date, or the same shall be void against subsequent purchasers, so recording the said deeds, &c., within the time prescribed. The fourth section of the act of Dec. 6, 1821, provides that conveyances and other instruments of writing, by which the title of land may be affected, either in law or equity, shall not be valid, except between the parties thereto and their heirs, until the same shall have been deposited in the clerk's office for record, as the law directs. The section further declares it to be the duty of the clerk to keep lists of deeds filed in the office for record, open to the inspection of every one, with the date of each filing marked, &c. This last act was not in force until the first of March, 1822.

The act of 1821, was designed beyond doubt to be declaratory of the law, so far as it related to the filing of deeds for record. Neither the act of 1804, nor that of 1817, intended to leave the rights of purchasers at the mercy of the clerks of courts. The 10th section of the act of 1804, which is the first law passed on this subject in the district of Louisiana, requires the Recorder to keep a book, in which it is his duty *immediately* to make an entry of every deed or writing brought

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into his office to be recorded, mentioning therein the date, the parties and place, &c., dating the same entry on the day on which said deed or writing was brought into his office. It was further made his duty to record such deeds in regular succession, *according to their priority or time of being brought into said office.* These duties are moreover enforced upon the Recorders by inflicting severe penalties for their omission.

The act of 1804 required deeds to be recorded within twelve months; if not so recorded they were declared void as against subsequent purchasers and mortgagees, unless recorded before the second deed. The act of 1817, requires deeds to be recorded within *three* months, and makes all deeds not recorded within that time void as against subsequent deeds so recorded. The act of 1821 does not limit the time for recording deeds, but declares all conveyances invalid, except as between the parties thereto and their heirs, until they shall have been deposited in the clerk's office for record as the law directs. The act of 1825, is still more specific, and in terms declares that the *filing for record* shall impart notice. There is nothing in the language of any of these acts, calculated to show that it was not the design of the legislature from the first to the last to make the filing in the Recorder's office a notice to all the world; on the contrary, as much may be implied from the act of 1804, and though the next act of 1817, is silent on this subject, when it is again resumed in 1821 the law is so expressly declared, and continues to be re-enacted up to the present time.

It will be observed that the act of 1817 does not alter the provisions of the act of 1804, except in reducing the period within which deeds might be recorded, from twelve months to six. All the provisions of the last mentioned act, which required the day on which the deed was handed to the clerk to be noted in a book, and a receipt for the deed containing an abstract from the minute book to be delivered to the person filing the deed, were unaffected and unrepealed. But if the party files his deed within the three months, and the clerk fails to record it until the expiration of that time, of what avail would these requisitions of the statute be to the purchaser? According to the construction given to these acts by the circuit court of Lincoln, the title depends entirely upon the industry or integrity of the Recorder. An exact compliance with the law on the part of the purchaser, can avail him nothing, if the Recorder, over whom he has no control, thinks proper from motives of mere negligence or dishonesty, or is compelled from the press of business, to defer the execution of the part assigned to him, until the limitation expires. This construction of the law, we

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think erroneous, and therefore the judgment of the circuit court will be reversed.

There is another point in the case, about which but little has been said in the briefs of the counsel, but which in another trial, it will be necessary to decide. The defendant insists that at all events the patents issued in 1825, constitute a better title than the confirmation in 1810. To support this opinion, reliance is placed upon the opinion of the supreme court of the United States, in *Wilcox vs. Jackson*, *Bagnoll & Byrne vs. Broderick*, and perhaps other cases not now recollected. The general doctrine of these cases is, that the fee remains in the United States, until a patent issues. This doctrine we have never understood to conflict with the position assumed by the same court in other cases, and especially in the case of *Strother vs. Lucas*, that a confirmation by law was equivalent to a patent, and constituted a complete title. The confirmation to *Zadock Woods* in 1810, by virtue of the 4th section of the act of March 3d, 1807, (L. L. p. 154,) vested in him a complete title to all the land embraced within the Spanish survey, and the United States could not, in 1825, convey the same land to another.

Judgment reversed and cause remanded.

VAUGHN vs. McQUEEN.

1. The act regulating marriages (R. C. 1835) which prohibits the marrying any minor without "the consent of the parent, or guardian, or other person having the care or government of such minor," limits the power to consent to one person, and does not give this power to each of the persons mentioned in the act, but only to that one, who has the care or government of the minor at the time.
2. Where there is a guardian, the parent cannot consent so as to justify the person joining the minor in marriage.

APPEAL from Pike.

C. WELLS, for Appellant.

1. It is not competent for the mother to consent to the marriage of her minor child, when that child has a guardian.

The county court has power to appoint a guardian, not only when

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there is no parents, but also when the parents shall be unfit for the duties devolving upon them. When so appointed such guardian supersedes the parents in their natural right and has entire control over the ward.

2. The plea is bad because it does not allege the father to be dead or disqualified.

BATES, for the Appellee.

POINTS AND AUTHORITIES.

1. *Qui tam* actions are judged with great jealousy, because the plaintiff does not seek to recover any thing that he has lost, nor to redress any individual wrong, but only to expose the faults of his neighbor and turn them to his own profit.

2. The part of the statute under which this action is brought is purely penal, and therefore must be construed strictly in favor of the defendant. Certainly it cannot be extended by implication. 1 Mass T. R. 167, *Berry vs. Ripley*; 2 John. R. 379, *Jones vs. Estes*.

3. The 6th section of the marriage act authorizes every judge, &c., to perform the ceremony of marriage. The 7th sec. forbids him to join in marriage any male under 21 or female under 18, "unless the parent or guardian or other person under whose care or government such minor may be shall be present and give consent thereto, or unless the minor applying shall produce a certificate in writing," &c. And the 8th sec. provides that "if any such person shall join in marriage any minor, without first having such certificate, or the presence or consent of the parent or guardian or other person having the care and government of such minor, such person shall forfeit \$300," &c. And it will be seen by the plea demurred to, that it is in the very language of the law.

4. Our law makes the parent, either father or mother, the natural guardian of their minor children. Rev. Code, p. 293. But when the parent is adjudged incompetent, there may be another guardian. And I insist that if either the parent or guardian be present at the marriage, and consenting thereto, no penalty attaches.

NAPTON, J. delivered the opinion of the court.

This was a *qui tam* action, to recover the penalty given by the 8th section of the marriage act, for joining in marriage a minor without the consent of the parent or guardian. The action was brought by Peter Vaughn, guardian of Ellen Vaughn, against Thomas McQueen, one of

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the judges of the county court of Pike county. The declaration charges, the defendant with joining in marriage Ellen Vaughn, who was under the age of eighteen, with Thomas McQueen, Jr., without the consent of the plaintiff, who was her guardian.

To this declaration the defendant among other pleas pleaded that the parent of the said minor, that is to say, her mother, was present and consenting to the said marriage. The plaintiff demurred to this plea; the demurrer was overruled, and judgment was given upon the demurrer for the defendant.

The only question to be determined is the sufficiency of this plea. In other words, can the mother of a minor consent to the marriage of such minor when there is a guardian?

The seventh section of the act regulating marriages, prohibits the joining in marriage of Minors, "unless the parent or guardian or other person under whose care and government such minor may be, shall be present and give consent thereto, or unless the minor applying shall produce a certificate in writing under the hand of the parent or parents or guardian, or if such minor has no parent or guardian, then under the hand of the person under whose care and government he or she may be." The eighth section affixes a penalty for transgressing this law.

Our act concerning guardians provides in certain cases for the appointment of guardians, whilst the father and mother are both living. There may also be a testamentary guardian, during the life of the mother. It may therefore happen, that the father, the mother and a guardian are all in existence at the same time, in which event the question arises, as it did in this case, whether the consent of either is sufficient to authorize the marriage ceremony, or whether the law contemplates only one person as authorized to give the consent either by his presence or certificate of approbation.

The only construction which we think justified either by the grammatical construction of the sentence, or by the general scope of the statute, with reference to its object and the mischief designed to be remedied, is the one which limits the power of consent to one individual, and authorizes the consent of another only in the alternative. The last clause of the seventh section provides that the certificate shall be "under the hand of the parent or parents or guardian, or if such minor has no such parent or guardian, then under the hand of the person under whose care and government he or she may be." This phraseology it must be admitted is loose, inartificial and inaccurate, but the sense is sufficiently apparent. In the eighth section, the meaning of the law-giver is more clearly expressed. It requires the officiating clergyman

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or justice, before proceeding to marry a minor to have "the certificate or presence and consent of the parent or guardian, or other person having the care and government of such minor." By this we understand that the consent of the person who has the legal custody of the minor whether he be the guardian, or the father, or the mother, or the master, must be obtained, and there can be but one person authorized to give such consent. A strange absurdity would result from any other interpretation. The courts may, by the authority vested in them by our laws, deprive a dissolute, worthless or insane parent of that authority with which the laws of nature have invested him, and place the person and property of the infant under the control of a guardian, and yet the father be allowed under the construction contended for by the defendant and sanctioned by the circuit court, to thwart the legitimate control conferred upon the guardian, and that too in one of the most important steps which can be taken by the minor, and one likely to have a most serious influence upon his future happiness and prosperity.

Whilst we recognize the propriety of the rule of law which requires penal statutes to be strictly construed, we do not understand that rule as requiring an interpretation which will frustrate the ends of the law and facilitate and increase the mischief which it seeks to prevent, when by a fair interpretation of its language a different construction is as well warranted.

The judgment of the circuit court is therefore reversed, and the cause remanded.

MOORE, ET AL, vs. THE STATE.

A bond given by a Collector is valid against him and his securities, although not approved by the county court.

ERROR to Caldwell.

DUNN, for the State.

POINTS AND AUTHORITIES.

1. The bond sued on, was found on file in the office of the clerk of the county court, and the approval of the court, even if considered

Brown vs. Pratte, to the use of the 21st road district.

necessary, will be presumed. Jones and others, vs. the State, to the use of Blow, 7 Mo. Rep. 81.

2. It was given after the election of the defendant, Moore, as sheriff and before entering upon the duties of his office as collector, and although it was executed several months sooner than the statute required it is nevertheless valid. Rev. statutes, 536, Art. 3, sec. 1, 2 and 3.

NAPTON, J., delivered the opinion of the court.

This was an action of debt upon the official bond of Enoch Moore, as collector of Caldwell county. The defendants pleaded *non est factum*, and performance of the condition of the bond. The issues were submitted to the court, who found for the plaintiff the sum of \$182 83, and judgment was given for that sum and costs.

Upon the trial, the plaintiff offered in evidence the bond sued upon, but its introduction was objected to, on the ground that it had not been approved by the county court. The objection was overruled, and the bond was read. The opinion of the court on this point, was excepted to, and is the only error complained of in this court.

In the case of Jones and others, vs. the State, to the use of Blow, this court held that the failure of the county court to pass upon a constable's bond, as the law requires, will not invalidate the bond, the omission to perform their duty in this respect, being no injury to the officer or his securities. The present case must fall within the same principle.

Judgment affirmed.

BROWN vs. PRATTE, TO THE USE OF 21ST ROAD DISTRICT.

In a suit brought by a road overseer, the summons required the defendant, "to answer the plaintiff, B. S. Pratte, for the use of the 21st Road District, in a plea of debt, on an account for failing to work on said road." Defendant appeared and moved to quash the writ, because he "was not summoned to answer B. S. Pratte, Overseer of Road District, No. 21, and because the summons did not show in what county the road district was situate." Judgment against defendant. On appeal to the circuit court, judgment was again rendered against defendant. A motion in arrest of judgment assigning fifteen reasons, was made and overruled.

Held,

That the court could see no substantial objections to the proceedings of the justice or circuit court.

Brown vs. Pratte, to the use of the 21st road district.

ERROR* to Ste. Genevieve.

HOLDEN & JONES, for Plaintiff in Error.

BRICKEY, for Defendant.

NAPTON, J., delivered the opinion of the court.

This was a suit commenced before a justice of the peace of Ste. Genevieve county, by Bernard S. Pratte, overseer of the 21st road district, for the use of said road district, against Robert T. Brown, jr. The summons issued by the justice, required R. T. Brown, to answer the plaintiff, B. S. Pratte, for the use of the 21st road district, in a plea of debt, for three dollars, founded on an account, for failure to work on said road. The summons was duly served on the defendant, Brown, and on the 9th September, the day appointed for the trial, the defendant appeared and moved to quash the writ, because the defendant was summoned to answer B. S. Pratte, for the use of the 21st road district, and not to answer B. S. Pratte, overseer of road district No. 21, and because said summons did not shew in what county said road district No. 21, was situated; and further, because said summons required defendant to appear before the said justice in less than three months after his last day of holding court. The motion was overruled and a jury was summoned, and the plaintiff obtained his judgment for three dollars. Defendant appealed to the circuit court.

Upon the calling of the case in the circuit court, the defendant filed his motion to dismiss, urging the same reasons heretofore stated in his motion before the justice, and some others, to about the same purport. The motion was overruled, a trial had, and a verdict against the defendant for three dollars.

The defendant then filed a motion in arrest of judgment, for fifteen causes set forth in the motion; some of them being the usual reasons offered for a new trial, and the others consisting of the objections heretofore noticed in the motion to quash.

This motion was also overruled, and judgment given for three dollars and costs, and the defendant appealed to this court.

A bill of exceptions is found in the record, detailing the above facts, and giving copies of the motions and the evidence offered. There was no proof, however, as to the law days of the justice.

PER CURIAM. Let the judgment be affirmed. We are unable to see any substantial objections, either to the proceedings before the justice or in the circuit court. Judgment affirmed.

Henshaw, vs. The Liberty Marine Life and Fire Ins. Company.

HENSHAW vs. THE LIBERTY MARINE, FIRE AND LIFE INS. COMPANY.

In an action upon a note payable "in whatever paper currency" is taken in a certain office on a specified day, no demand need be averred or proved.

ERROR to Grundy.

STRINGFELLOW, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The instrument of writing offered in evidence, did not correspond with the declaration—is not a promissory note.

2. There was no evidence of the assignment by the firm of Bird & Glasgows, as set out in the declaration—it being proved to be in the hand writing of a member of another and different firm.

3. The firm of Bird & Glasgows was proved to consist of persons different from those described in the declaration.

4. There was no evidence of a demand of "paper currency" by any person.

5. There was no evidence of the kind or value of the currency agreed to be paid. See Farewell vs. Kennett, et al, 7 M. R. p. 595; Martin vs. Chauvin, 7 Mo. R. 279.

6. The plaintiff, in the court below, is a *private* corporation, and no evidence was given of its existence or right to sue, and the court could not judicially know it. 15 Wend. 314; 17 Wend. 443; 8 Wend. 480; 7 Wend. 539; 1 Wend. 555; 2 Cow. 770; 14 John. 416.

7. The declaration is defective in not alledging the kind and value of the paper currency taken in the insurance office on the day of payment. Farewell, et al. vs. Kennett, et al., 7 Mo. R. 595.

8. It does not aver and show the existence of the company, and its right to sue.

9. It does not show a demand of the paper currency.

10. It declares on an inland bill of exchange, while the instrument as set out shows only a promise to pay a species of property, not *money*.

11. It does not show a breach in the promise to pay *paper currency*, but only a failure to pay *money*.

12. The instructions asked by the defendant below, and refused by the court, ought to have been given.

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13. The motions to set aside the verdict and grant a new trial, and in arrest of judgment ought to have been sustained.

SCOTT, J., delivered the opinion of the court.

This was an action of assumpsit, brought upon an instrument in writing, executed by Henshaw, the plaintiff in error, to Bird and Glasgows, and by them endorsed to the Liberty Marine, Fire and Life Ins. Company. The instrument was as follows:

"\$413 62. Liberty, Mo., Feb. 15, 1842. Four months after date I promise to pay to the order of Bird & Glasgows, four hundred and thirteen 62-100 dollars, without defalcation or discount, for value received, negotiable and payable at the office of the Liberty Marine, Fire and Life Insurance Company, with ten per cent. interest after due until paid; to be paid in whatever paper currency is taken in the above insurance office, 15th June. J. L. Henshaw." And the following endorsement was thereon: "Pay to the Liberty Marine, F. & L. Ins. Company. Bird & Glasgows."

The case was submitted to the court, upon the general issue. The plaintiff proved that the firm of Bird & Glasgows, was composed of James Glasgow, William Glasgow, jr., and Greenup Bird, and that the endorsement was in the hand writing of said Bird. The note and endorsement was then read in evidence, though objected to, also the protest of the notary for non payment. It was also proved the Indiana, Illinois and Kentucky paper money was current in Liberty, and that neighborhood, at the time said note became payable, and that said paper was from 5 to 10 per cent. below par, but the witness was unable to say what kind of money was taken by said company. The plaintiff asked four instructions, all of which were refused, except the second. The instructions were:

1. The plaintiff must show a demand of the amount of the instrument sued on at the time and place set out in said instrument.
2. That the kind of paper currency taken at the time and place mentioned in said instrument, must be shown, and its value as compared with specie.
3. That there was no sufficient evidence of a partnership of Bird & Glasgows.
4. There is no sufficient evidence of the kind of paper, or its value compared with specie, at the time of payment specified in said note.

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The court found for the plaintiff \$421 79. Defendant filed his motion for a new trial and in arrest of judgment; which motions were overruled.

The principal errors assigned and relied on for the reversal of the judgment, are:

1. That the plaintiff did not prove its corporate existence, and being a private corporation, this was essential.

2. The declaration alledged a promise to pay to the order of Greenup Bird, William Glasgow, sen'r, and William Glasgow, jr. Whereas the firm of Bird & Glasgows, was proved to consist of William Glasgow, jr., James Glasgow, and Greenup Bird. This is insisted on as a fatal variance, and that the note and endorsement should have been excluded, as being made by a different firm from the one described.

3. There was no evidence, or no sufficient evidence of the kind and value of paper currency in which the note was payable.

4. No demand is averred or proved at the time and place specified in the note.

The first objection is founded upon a mistake, in point of fact. The act of incorporation is declared to be a public act. See Acts 1838-9, p. 222; Acts 1836-7, p. 189.

The second error assigned, is the variance between the proof and the allegations of the declaration, in relation to the endorsement of the note. The declaration averred that the note was payable to William Glasgow, sen'r, William Glasgow, jun'r, and Greenup Bird, and that the note was endorsed by them to the plaintiff, under the style of Bird & Glasgows. The proof was that James Glasgow, Wm. Glasgow, jr., and Greenup Bird, were the payees, and that the assignment was made by them under the style of Bird & Glasgows.

A variance between the real name of an endorser, and that which is alledged in the declaration, and appears on the bill, is immaterial. *Forman vs. Jacob*, 2 Eng. Com. Law Rep. 288; 2 Chitty's Pl. 127.

It has been frequently held that on a note like that sued on in this case, no demand was necessary. *Smith vs. U. S. Bank*, 11 Wheat. 171.

By a division of the court the judgment will be affirmed.

NAPTON, J. I do not concur. A misdescription of the names by which the payees were called, might be immaterial, provided they were identified as in the case of *Forman vs. Jacob*, but here the parties are not the same as those alledged in the declaration. This point is, then, in my opinion, with the plaintiff in error. On the other points, I concur with Judge SCOTT.

 Clark and Wife vs. Henry's Adm'r.

CLARK & WIFE vs. HENRY'S ADM'R.

1. Courts of equity in this State, are not confined in their jurisdiction to cases in which adequate relief cannot be had at law. The 5th clause of 8th sect. of the act establishing courts, R. C. 1835, was not intended to restrict courts of equity, nor to take away any power usually exercised by them.
2. Courts of equity have jurisdiction of a bill charging an executor with waste in not accounting for property which had come into his hands, although a final settlement had been made with the county court.
3. In such a proceeding, neither the heirs of the testator, nor the administrator *de bonis non*, of his estate, are parties interested.
4. Although slaves are personalty, yet they are regarded as of a peculiar, and distinctive character, and would not be embraced in a general bequest of personal property, unless the intention of the testator were plain, and manifest—hence it was held, that a clause in a will in these words, "My crop of grain, farming utensils, and household and kitchen furniture, and stock, all of which I want valued and acted on according to law, after my affairs are settled, then if there is a residue from hire of negroes, crop, &c., I wish to be given to Eleanor Erwin," could not be construed to embrace a slave born after the death of the testator.

APPEAL from Lincoln.

CARTY WELLS, for Appellants.

BATES, for Appellee.

POINTS.

1. A court of equity has no jurisdiction, the subject matter being proper for a court of law.
2. The proper parties are not made, and on this bill the court cannot do complete justice.
3. The merits are with the defendant.

NAPTON, J., delivered the opinion of the court.

In 1836, Eleanor Erwin filed her bill in the circuit court of Lincoln county, against Francis Henry, executor of the last will and testament of Malcolm Henry, deceased. The bill was dismissed by the circuit court for want of equity. An appeal was taken to this court, and the decision of the circuit court for Lincoln county was reversed, and the cause remanded. (See 5 vol. Mo. R. 471.) The substance of the original bill, as well as the grounds of the decision of this court, may be

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found in the report of this case. The complainant subsequently intermarried with one William Clark, who is now a co-complainant; they filed their amended bill at the November term, 1838. This amended bill represents that Malcolm Henry died in September, 1832, having made his will, in which, among other things, is found the following: "Item 1st, It is my desire and will, that my boy Adam, Juno and Cynthia, be released from bondage, on condition that Juno serve my sister Mary one year; Adam and Cynthia to serve the executor of my estate, (or serve them whom he may hire them to,) Adam to serve two years, and Cynthia to serve four, each then to have their perfect freedom." The will concludes as follows: "My crop of grain, farming utensils, and household and kitchen furniture and stock, all of which I want valued and acted on according to law, after my affairs are settled, then if there is a residue from hire of negroes, crop, &c., I wish to be given to Eleanor Erwin."

The bill charges that the executor, shortly after the death of the testator, about the 25th September, 1832, took out letters testamentary, took possession of the real and personal estate, made inventories, paid debts, and collected money due the estate; that he paid all the debts and all the specific legacies, and sold all the personal property which the will had directed to be "acted on according to law;" that in November, 1835, the said defendant made a final settlement of his executorship, and that upon said final settlement, the county court of Lincoln county, did find, that after paying the specific legacies and funeral expenses, and the debts owing by said estate, and the expenses of settling the same, there was no residue. The bill then charges, that the assets were more than sufficient to pay all debts and expenses and legacies and that the executor had fraudulently appropriated a large amount to his own use. The complainants further allege, that the female slave, Cynthia, after the testator's death, and before she became free by the will, had a female child, (named Adaline,) and in relation thereto the testator died intestate, and charges that the executor failed to apply the value of the slave Adaline, the wearing apparel of the estate, the hire of Adam for two years, and of Cynthia for four years, to the purposes of the estate, but had appropriated the same to his own use. The bill charges that various articles, among others, a horse, some hides, and corn, were not inventoried as they should have been. The bill further charges that the executor opened a trunk of said testator, and calls for a discovery of its contents.

The answer admits the statements of the bill, in relation to the will, executorship, and taking possession of the assets—affirms, that inven-

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tories were made of all the property of the deceased—declares that the defendant has paid all the legacies, and among others, complainant's; that he made regular settlements with the county court as required by law, and made his final settlement at the time specified in the bill; and that upon such final settlement, it was adjudged that there was a balance due the defendant from the estate, of \$77 31 3-4. The answer further declares, that the defendant paid to complainant \$117, and took her written receipt for the same, which sum is the precise amount of the hire of the negroes, mentioned in the bill, after deducting the balance found in his favor as above stated, on final settlement. The answer admits all the allegations in relation to the woman Cynthia, and her child, and admits his present possession of said female child. The respondent further avers that he duly accounted with the county court, for all the cash and other property which was found on the premises of the testator, or which in any manner came to his hands; denies all fraud or concealment of property, and contends that the inventories and settlements with the county court cannot again be investigated.

The evidence read at the hearing, established that the negro man, Adam, would have hired for about ninety dollars during the years 1833 and '34—that the woman Cynthia, would have hired for about \$25, with the incumbrance of a child, without such incumbrance she was worth more. There was no evidence to establish any payment on the part of the defendant, as averred in the answer, except a tender of \$125 in cash and notes, which was refused by the complainant. The charges in relation to the trunk, the hides, and wearing apparel, appear to have been waived.

Upon the hearing of the cause, the circuit court dismissed the bill, and the cause is brought here by appeal.

The first question which demands consideration, is the one relating to the jurisdiction of the court. This question was considered and determined by the court when the case was before it on a former occasion, (see *Erwin vs. Henry*, 5 M. R.) So far as the conclusion to which the court then arrived was founded upon the phraseology of the 15th section of the act concerning courts, it is not, as we have heretofore taken occasion to observe, (*Miller vs. Woodward & Thornton*, 8 Mo. R. 169,) authorized by the language of that section. The jurisdiction of courts of equity in cases like the present, must rest upon the broad clause of our statute, which gives them the general control over executors and administrators, and upon that well settled maxim by which courts of equity retain a jurisdiction originally acquired by rea-

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son of the want of a complete and adequate relief at law, notwithstanding the common law courts have been subsequently invested by the legislature with full power over the subject. The jurisdiction of courts of equity rests upon the same foundations as that of courts of common law, however the jurisdiction of either may have been originally acquired. It is not to statutory provisions that we look for ascertaining the limits of either. Long usage, the decisions of the courts, and the treatises of learned writers, are the chief sources to which we have recourse, when legislative enactments are silent, for the purpose of learning the province of either courts of law or courts of equity. Why should a different rule be adopted in the one case than the other? It is because the legislature have declared that courts of equity shall have jurisdiction in all cases where adequate relief cannot be had by the ordinary course of proceedings at law? This we understand to be a mere general definition of the nature and character of chancery courts, as contradistinguished from courts of common law. If interpreted strictly and literally, as has been urged at the bar in the present case, to what narrow limits would our courts of equity be confined? Entire branches of equity jurisprudence, heretofore and up to the present time, exercised without dispute or question, would be lopped off from the system. The whole subject of fraud, a most prolific source of equity jurisdiction, may now be fully investigated in the common law courts. The foreclosure of mortgages has been provided for, and courts of common law are as competent to sell equities of redemption, as courts of equity formerly were. Discovery can now be had at law, as well as in equity, and accidents arising from lost instruments, may be remedied as well on the common law, as on the chancery side of our dockets. Yet courts of equity in this State, have continued to exercise their accustomed jurisdiction on these, and other subjects similarly situated, notwithstanding the general provision in our code restricting them to cases where adequate relief cannot be had at law. To say the least, it would be highly impolitic, at this late day, to attempt to cut off the sources of jurisdiction, without a more express and definite declaration from the legislative department of the government. It would be a bold step on the part of this court to undertake now to correct this *communis error*, if it be one, into which our lawyers and courts have indiscriminately fallen. But we apprehend that the legislature did not design so to restrict the power of courts of equity. The language employed in the 5th clause of the 8th section of the act establishing courts, was probably as accurate as could have been suggested, to define the general purposes and objects of a court of equity.

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It was such a definition as might have been found in any elementary treatise on equity law, the writers on which science having frequently described equity to be that branch of the law, designed to remedy that wherein the common law, by its universality, is deficient.

The seventh article of our administration act, has given to the county courts jurisdiction in actions of waste against an administrator or executor; yet this has not been supposed to divest the circuit courts of the power to try actions of waste. Why should it deprive the court of chancery of a proceeding, which has been more commonly resorted to than an action of waste, or a suit upon the bond of an executor or administrator?

In the case now under consideration, the estate has been settled, and the bill does not seek to revise any action which the county court has had in relation to that settlement. It charges that the executor did not account for all the property which came to his hands; that nothing has been done with the slave Adaline, and that the hire of the negroes is unaccounted for. Upon these charges, and charges of a similar nature, the executor is sought to be held personally responsible. That bills of this character have been generally entertained by courts of equity is not denied; and we have not been able to perceive any provision in our statute which would prevent them from being entertained here.

This view of the nature of the present proceeding, will also dispose of the second objection, which relates to the want of proper parties. Since the case has been depending here, the death of Francis Henry, has been suggested, and the suit revived against his administrator.

It is contended that the administrator *de bonis non*, as well as the heirs of Malcolm Henry, deceased, should have been made parties. But as this is not a proceeding against the estate of Malcolm Henry, but against his executor for a *devastavit*, there can be no necessity for joining the heirs of Malcolm Henry, or the administrator of the goods unadministered by his executor in this suit.

The remaining question presented by the record, involves the propriety of the decree of the circuit court, upon the bill, answer and testimony.

The first branch of this enquiry relates to the condition, and proper disposition of the child of Cynthia, named Adaline, born after the death of the testator. It is contended that Adaline is a slave, and that her value should be substituted in lieu of the other personal property which was sold to pay the testator's debts, and that complainant is entitled to her value, under the clause which makes her the residuary legatee of

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certain personal property. This claim depends upon the construction of the testator's will. The clause relating to the subject is as follows: "My crop of grain, farming utensils, and household and kitchen furniture, and stock, all of which I want valued and acted on according to law, after my affairs are settled, then if there is a residue from the hire of negroes, crop, &c., I wish to be given to Eleanor Erwin." By this clause the testator designs his stock, crop, farming utensils, and other personal property of the like kind to be sold, and applied to the payment of his debts, and if a surplus remains, it is bequeathed to the complainant. She is then a special contingent residuary legatee, and the question arises whether the slave Adaline (we assume she is a slave for the purposes of investigation) was in the contemplation of the testator, or whether it can be inferred from the language of this clause, that she was designed to be embraced within the general enumeration of property, from the sale of which the complainant's legacy was to be derived.

Slaves are by our law personal property, but of a distinctive, and peculiar character. In all, or nearly all of the slaveholding States, they are declared personal property, and are transferred as other personal property. In all of them, they may with propriety, be called personal property, as contradistinguished from land. Yet the laws of all these States, and the decisions of their courts, have recognized a value in this species of property, arising from circumstances independent of their mere pecuniary value in the market. The age, health and disposition of slaves, their aptitude for particular employments, the length of time during which their owners, or their owner's ancestors have possessed them, their matrimonial connexions, and other like circumstances, contribute to fix the degree of estimation in which their proprietors hold them, apart from the amount of money into which they can be converted in market. This fact as may be readily conjectured, has not been lost sight of in the legislation of the slaveholding States. Hence it was held by this court in the case of *Rennick vs. Chloe* (7 Mo. R. 197) that an act of the Kentucky Legislature, authorizing individuals to dispose of their chattels by will, did not authorize them to liberate their slaves, the court presuming that when the Legislature designed to embrace slaves in the provisions of a law, they would do so, *eo nomine*, and not under the general designation of *chattels*. Hence also, under our administration laws, slaves are the last species of personal property, subject to be sold for the payment of debts, and indeed the county court is authorized to order the sale of *lands* in preference to slaves, where such a course seems beneficial

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to the estate, or when it is desired by the legatees or distributees. Whilst therefore slaves are personal property, and may be transferred under this general designation, it is worthy of observation, that neither our legislatures in enacting laws affecting this property, nor individual owners, in declaring their intended disposition of it, either by deed or will, have been apt to lose sight of the fact that they are also human beings, and therefore the intention to affect this species of property, under the general description of *personalty*, should appear manifest and plain, before a court could give such language, so broad an interpretation.

The question then recurs upon the interpretation of this will;—was it the design of the testator, when he desired his crop of grain, farming utensils, household and kitchen furniture, &c., to be sold, and in the event of a surplus, after the payment of his debts, that such surplus should be given to the complainant, to include the slave, Adaline, in this enumeration? It is conceded that by a fair interpretation of the will, the enumerated articles were only designed as specimens of the kind of property from which the residuary legacy to E. Erwin, was to arise. The clause may be extended to every species of personal property of a similar character and value, with those enumerated; but to extend it still further and include a species of property of greatly superior value and consideration, and of a distinctive character such as slaves, would be a perversion of the manifest intent of the testator. Is it to be supposed, that the testator, who evinced a remarkable anxiety to liberate all his slaves, upon certain conditions specified in the will, should have been willing to dispose of one unborn, under an “&c.” attached to an enumeration of grain, farming utensils, furniture, and similar articles of small value? Had the testator been the owner of fifty, instead of two female slaves, and liberated the fifty, upon the same terms he did Cynthia, and the fifty slaves became the mothers of as many children, the legatee of the surplus arising from the sale of grain, stock, &c., would have been thought to manifest a good deal of assurance to claim the fifty slaves. Yet the principle is the same. Had the testator been left a landed estate, of which at the time of making his will he was ignorant, it would be admitted that such estate would not pass, because the residuum is limited to personal property. It is limited to personal property, and limited as we think, further, to such description of personal property, as would correspond in some degree, both in regard to its character, and its value, with the species of personal property enumerated. Certainly it cannot reach

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slaves, a species of property as distinctive in its character, as real estate.

When we consider that the complainant is not the first, or principal object of the testator's bounty; that she is only a contingent legatee at most, and that the fund, from which her legacy was to spring, embraced only articles of small value, that the testator had devised his farm to one, and a slave to another, and this slave only for the life of the legatee, evincing by his careful disposition of every slave he had, his intention of not confounding his slaves with the mass of his personal estate, it seems difficult, if not impossible, to arrive at the conclusion, that this slave was designed by the testator, either for the payment of his debts, or for the benefit of the complainant.

Upon this construction of the will, what right has the complainant to ask that the value of this slave, shall be substituted for the personal property, which was applied to the payment of debts? What claim can there be to substitution, where the fund was properly and rightfully appropriated? The personal property of the testator was sold, as his will directed, and the slave which came into existence after his death, about which the will was silent, was not sold because not needed for that purpose. There was then no mal-administration, so far as this slave was concerned, for the residuary legatee of another fund, not embracing the slave, had no claim or title to her.

As to the hire of the negroes, the defendant admits that the amount actually received from this source was \$194 31. Deducting from this, the sum of \$77 31, that being the balance due him on final settlement, leaves the sum of \$117, which defendant tendered to complainant in money and notes, but which was not received. The witnesses state Adam to have been worth \$90 per annum, and Cynthia \$25—this would make the hire amount to \$280; which after the deduction of \$77 31, would leave a balance against the defendant of \$202 69. For this sum we think the complainant entitled to a decree.

The decree of the circuit court is therefore reversed, and this court doth order, adjudge and decree, that the defendant pay to the complainant the sum of two hundred and two dollars and sixty-nine cents.

BIEHLER AND OTHERS vs. COONCE.

1. The tabular statement of the books of the Recorder of land titles, shewing the confirmation of a lot, its size, &c., are admissible as evidence.

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2. Evidence of occupation, cultivation and possession of a lot, previous to 20th December, 1803, shewing a right to a confirmation, are as good evidence as the certificate of confirmation.
3. It is error in a Judge on refusing an instruction, to accompany it with remarks calculated to mislead the jury.

ERROR to St. Charles.

WM. M. CAMPBELL, for Plaintiff in error.

POINTS.

The plaintiff contends :

1. The jury must be supposed to have taken the law from the court, and if misled by the court as to the law that governs the case, they erred in a matter of law.
2. The statements of the Judge in this case, were calculated to mislead the jury as to the construction of the law and the legal right of the plaintiff to recover.
3. The evidence in this case affords no warrant for the jury to find that McDonough street ran through the land possessed by defendants below; unless the jury were misled by the illegal declaration that it might have been a street in contemplation.

BATES, for Defendant in error.

NAPTON, J., delivered the opinion of the court.

Felix Coonce, the defendant in error, brought an action of ejectment to recover a lot in the town of St. Charles, against Biehler, Grater & McIntosh, and Emilie Chauvin, administratrix of F. D. Chauvin, deceased, was admitted to defend the suit. The lot was described in the declaration, as 240 feet French measure in front, by 300 feet in depth, bounded on the west by Main street, on the north by McDonough street, on the south by Chauncy street, and on the east by the sand bar of the Missouri river. A trial was had in the St. Charles circuit court in 1839, and a verdict for the plaintiff for 79 feet 3 inches on Main street, running with that breadth to the river. Upon the application of the defendant below, a new trial was granted, and a similar verdict was again found upon the second trial, upon which the court gave judgment.

The plaintiff, to support his claim, gave in evidence a certificate from the Recorder of land titles, Theodore Hunt, dated 7th May, 1825,

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for the lot described in the declaration, which certificate was given by virtue of the act of Congress of 1824, supplementary to the act of 13th June, 1812. The lot was confirmed to John Coonce, and the plaintiff then exhibited his deeds showing a derivative title from the admitted heirs of John Coonce. The plaintiff further proved the possession by the defendants, Beihler, Grater & McIntosh, of part of the lot, as tenants under Emelie Chauvin. The testimony of Cunningham, the county surveyor of St. Charles co., was also introduced, and a survey which said Cunningham had made by order of the court in this case. The survey is not, however, to be found in the bill of exceptions. This witness testified that he had at different times made partial surveys of the streets and lots in the town of St. Charles, by order of the board of trustees of said town, and occasionally at the instance of private individuals; that he had never seen any official survey of the town, nor has any such plat or survey been in the possession of the board of trustees since he has been living in the place. The plan pursued by him in surveying, has been to find some point generally acknowledged and recognized in said town, and thence to run by the best statement of courses and distances he could obtain, until he found the lot or street desired. The witness had seen plats of surveys of the streets of said town, said to have been made by Joseph Evans and Nathan Boone; that there was formerly in possession of the board of trustees a plat which was on a blank leaf of a record book of said board, which had the streets laid off on it, and which said board used and recognized in doing business for said town. Witness presumes that the plat was made by said Evans about 20 years since, but does not know it; that the plat of Boone is nearly a copy of said plat of Evans. Witness used these plats in his surveys of the town. The witness then stated that the survey made in the present case was made upon these data, and that if his premises were correct, McDonough street was 69 feet 3 inches north of the line claimed by the defendants as the boundary of their lot. That by this survey McDonough street would run through two of the houses of defendant; that the 69 feet 3 inches which would fall on the plaintiff's lot, would also take in one of the brick tenements claimed by defendants, and some other frame buildings. Witness in making surveys, sometimes departed from the plat, and was regulated by the confirmations of the squares; most generally, however, he pursued the plat without reference to the size of the squares, or lots, as called for by the confirmations, the breadth of the squares in St. Charles, not generally corresponding with the breadth confirmed to the proprietors. The distance between the streets as used, is generally much greater than the

tance called for in the confirmations of the squares and half squares ; the squares being generally confirmed as having 240 feet, French measure, in front, whereas some of them are actually more than 400 feet in front. The witness thought that if a survey was commenced at either end of the town, or at any given point therein, and the streets and squares laid off according to the front called for in the confirmation, the position of the cross streets would be entirely changed, and would not any where correspond with the streets and squares as now used and recognized.

Another witness on the part of the plaintiff, testified in relation to Evan's survey, and sated that no street or road had ever been used within his knowledge, (and he came to St. Charles in 1809,) at the place where McDonough street is claimed to be by the plaintiff ; but that the plat of Evans had always been referred to by the board of trustees, (of which he had been twice a member,) whenever the position of the streets, &c., of St. Charles was desired to be ascertained.

The defendant offered in evidence a copy of an extract from the registry of confirmations by the Recorder of land titles, being a confirmation to Charles Tayon, on the 6th April, 1825, of a lot in the town of St. Charles, bounded on the south by McDonough street, west by Main street, north by Water street, and east by the Missouri River, 240 feet front. This certified copy was rejected. Copies of deeds from Tayon to W. J. Devore, and from Devore to D. McNair, and from McNair to Chauvin, were also offered in evidence, but rejected.

The defendant proved by Thomas Gilmore, that as far back as 1801, Charles Tayon lived on the premises now claimed by Coonce's representatives ; that his enclosure reached within a few yards of the branch called Blanchette, and between it and the branch there was a road used to go down to the river, the ferry landing being immediately east of Tayon's house ; that this enclosure of Tayon, which embraced his dwelling house and several out-houses, garden, &c., extends nearly to the spring branch on the northern extremity of his lot ; that the buildings and improvements at that time appeared to be old ; that said Tayon claimed and occupied said premises as his own ; and when the old pickets which separated his enclosure from the road going to the ferry, became decayed, he built a new fence on the same line. Witness knew of no street or road passing through this lot, and never heard any spoken of. Witness knew Coonce's lot, and was once offered it by Coonce, who was about to sell it, in consequence of ill health. Coonce had no improvements on it, except a mill and hay shed, and he was told by Coonce that his mill was on the lower edge of his lot. Witness

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never heard Coonce lay any claim to any ground north of said branch on which his mill was, nor did he ever hear him object to Tayon's claim.

Another witness testified that he had known the lot for forty years; that when he first knew it, it was claimed and occupied by Charles Tayon; that his enclosure extended from very near the branch Blanchette to the spring branch on the north. In relation to Coonce's lot, he testified about the same as the other witness; that his improvements did not extend north of the Blanchette branch; and that he never heard him claim any ground north of that branch, or dispute Tayon's claim.

Much other testimony was given to the same purpose. The defendant asked the court to instruct the jury, that in order to prove that any part of the premises possessed by the defendants was south of McDonough street, as claimed by the plaintiff, the plaintiff must prove that such a street has been established by some lawful authority, or that a street had been recognized at the place where the plaintiff now claims McDonough street, by long usage or public notoriety. This instruction the court refused to give, but stated to the jury that it might be a street merely in contemplation. The plaintiff then moved the court to instruct the jury that no evidence had been given to rebut the claims of John Coonce to the premises in controversy. The court refused to give said instruction, and stated as a reason therefor, in the presence of the jury, that by possibility some evidence of rebuttal might have been given, which has not been heard or recalled by the court. The defendant excepted to this declaration of the court, and afterwards moved for a new trial, which was refused.

The grounds upon which this judgment is sought to be reversed are, first, the exclusion of certain evidence offered by the defendants, and secondly, the instructions refused, and observations made by the judge in the presence of the jury.

The first question is one of no practical importance in the decision of this cause. For though the court excluded the copies of extracts from the books of the Recorder of land titles, showing that a lot of the description, size and boundaries claimed by the defendants had been duly confirmed under the act of 25th May, 1824, yet ample evidence was afterwards given that such a lot had been occupied, cultivated and possessed by Charles Tayon, previous to the 2d Dec. 1803, sufficient to bring him within the provisions of the act of 13th June, 1812. In the case of Janis's adm'r vs. Gurno, whilst this court considered the certificate issued under the act of 1824, as *prima facie* evidence of a confirmation under the act of 1812, it was not regarded as conclusive, and proof before the court of all the circumstances and facts necessary to

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make out a claim under the first act, it was believed would be quite as satisfactory as the certificate of the recorder. Upon what ground the tabular statements contained in the Recorder's books were excluded, does not appear, but it is presumed that the court excluded them, because the act had provided for the issuing of a certificate, which certificate would be, it may be thought, the best evidence of the confirmation. The tabular statements from the books of the Recorder, it may be observed, have been frequently admitted in evidence without question, and when questioned, their admissibility has been sanctioned by this court. *Roussin vs. Parks*, 8 Mo. R.

It seems from the testimony which we refer to, merely with a view to ascertain the propriety of the instructions, that Chas. Tayon inhabited, cultivated and possessed a lot in the town of St. Charles, as far back as 1801, and continued to inhabit, cultivate and possess the same until after the change of government; that John Coonce, from whom the plaintiff derives title, also occupied a lot adjoining, and subsequently in 1825, obtained a certificate from the Recorder of land titles for the said lot, under the act of the 13th June, 1812. It will also be seen, if we are at liberty to look into the evidence which the defendants before offered, but which was rejected, that each of these claimants had their claims allowed under the act of Congress of May 26, 1824, and the certificates issued to each, calling for McDonough street as the boundary between their lots.

The only matter in dispute between the parties is the locality of McDonough street.

That this street never had been in actual use, appears from the testimony of the witnesses on both sides. That no public highway of any description ever passed where the plaintiff now claims McDonough street to be, and that none was ever supposed to pass there by either Tayon or Coonce, may be easily inferred from the testimony. Must it not then devolve on the plaintiff to justify an ejection of the defendants, from a possession of forty years standing; to show with some degree of certainty the locality of this street? It may have been as the circuit court observed to the jury, a street in contemplation, but it must have been so contemplated by some general plan of the town, which had at some period received the assent of the proprietors, or it must have been by virtue of some law, either of the former government or the present. All the French villages, it is well known, were laid out on some general plan, with streets and squares of a particular and known width. But it seems that the county surveyor, Mr. Cunningham, in ascertaining the position of McDonough street, occasionally followed

the plan, and occasionally deviated from it. It seems that a survey of Perry street, according to the plat by which he made the survey in this case, would have passed through sundry houses of different citizens; he therefore at that point abandoned the survey of Evans, and regarded only the extent of front called for by the confirmations to the proprietors. In every other instance he disregarded the confirmations and followed the survey. It is not understood why an exception is to be made in favor of the proprietors of lots at the corner of Perry street, which is not conceded to those living on McDonough street. The width of the squares as confirmed, it seems from the statement of Mr. Cunningham, does not correspond in scarcely any instance with their width as actually used, and as laid down on the plat of survey by which the surveyor was guided in ascertaining the locality of McDonough street. Nor does the plat of Evans show the width of the squares or of the cross streets. Upon what principle then or what plan Mrs. Chauvin's tenements have been converted into a public highway, does not appear. Some light upon this subject perhaps would be shed by the plat made by the surveyor, which was examined by the jury, but which is not contained in the bill of exceptions.

We are not prepared to say that the instructions asked by the defendant should be given, at least, without an alteration of its language. It was couched in such general terms that it might be made to mean anything or nothing. The remarks made by the judge in refusing to give that instruction may also be correct enough, if properly understood, though it will admit of an interpretation calculated to mislead a jury. A street may certainly exist in contemplation; that is, it may have an existence, notwithstanding it has never been opened or used as a highway. But where this is so, it must certainly be in consequence of some general plan of the town, either made according to law, or springing into use by the general consent of the inhabitants, and adopted and recognized as such. Was McDonough street in existence at the place claimed by the plaintiff, either by actual use or by its being called for by the general plan of the town in 1812, when Tayon's lot was confirmed. It is not meant that the street must have been known by that name, for it is very unlikely that McDonough, Perry and Chauncy streets could have been known by these names at so early a day. The successes of these gallant naval officers having been mostly achieved, as history informs us, at a later period. The locality of the street, being as the record shows, on the outskirts of the village, must have been determined either by the fancy of the adjoining proprietors, according to the actual extent of the ground occupied by their buildings

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and enclosures, or by a general plan to which they were bound to conform. If such a plan existed, Mrs. Chauvin or those from whom she derived title, had no right through inattention, ignorance or for convenience, to erect buildings and make enclosures on such street or upon the lot of an adjoining proprietor, and if such was done it would clearly not divest the rights either of the public or of the adjoining lot owners.

The remark of the circuit judge in refusing to give the instruction asked by the plaintiff, we consider equivalent to giving an instruction. The jury look to the judge for an exposition of the law, and it is to be presumed, are also disposed to pay great deference to his opinions, either on the law or facts of the case. For the court to decline telling the jury that there was no evidence to rebut the claim of the plaintiff, but to accompany that refusal with the declaration that by possibility *some* evidence had been given which had not been heard, or if heard had escaped his memory, was certainly calculated to produce an impression exceedingly unfavorable to the defendants.

The judgment will be reversed, and the cause remanded for a new trial.

HIGBEE ET AL. VS. BOWERS.

A decree, "*that the defendant pay the complainant his costs herein expended, and that execution issue therefor,*" is no final decree, from which an appeal will lie.

APPEAL from Platte.

HICKMAN, for the Appellant.

E. L. EDWARDS, for Appellee.

POINTS AND AUTHORITIES.

1. Nothing can be assigned for error in this court "except such as was made the subject of exceptions below." See *Swearingen vs. Newman*, 4 M. R. 456; *Shelton vs. Ford & Whitehill*, 7 Mo. R. 211; *Steamboat T. vs. Erskine & Gore*, Ib. 251.

2. The defendant excepted, first, to the introduction of the lease, made an exhibit in the bill; second, to the overruling of the motion to set aside the decree; third, to the exclusion of certain deeds offered by them in evidence.

Campbell vs. The State.—Fugate & Kelly vs. Muir.

SCOTT, J. delivered the opinion of the court.

The only decree in this case is, that the defendants pay the complainant his costs herein expended, and that execution issue therefor. It does not appear what has become of the bill or the suit; for aught that appears, it may be still pending. This, then, is not a final decree, within the meaning of the statute, from which an appeal or writ of error will lie. Let the appeal be dismissed.

CAMPBELL vs. THE STATE.

APPEAL from Livingston Circuit Court.

BAY, Attorney General, for the State.

The evidence and proceedings in the cause not being preserved in a bill of exceptions, the court will presume that the circuit court properly overruled the appellant's motion to set aside the verdict and grant him a new trial.

SCOTT, J., delivered the opinion of the court.

The only errors complained of in this cause, being the giving of improper instructions and the refusal to grant a new trial, and there being no bill of exceptions preserved in the record, the other Judges concurring, the judgment will be affirmed.

FUGATE & KELLY vs. MUIR.

Where a cause is tried by the court sitting as a jury, and no exceptions are taken until after a verdict is rendered, the judgment will not be reversed in the supreme court.

ERROR to Jackson.

SCOTT, J. delivered the opinion of the court.

This cause was submitted to the court sitting as a jury, and no exceptions were taken to the introduction or exclusion of any testimony, nor were any instructions asked, nor the court required to declare the law on the facts of the case. After a verdict is found against the plain-

The State, to the use of James Darland, Adm'r, &c., vs. Porter, et al.

tiff in error, then for the first time exceptions are taken. They are then too late; *Little & Noecker vs. Nelson*, 8 Mo. R. 709; *Von Phul vs. City of St. Louis*, 9 Mo. R. These cases are in accordance with the ancient and long established usage of this court. *Davis vs. Scruggs*, 2 Mo. R. 187.

The other judges concurring, the judgment will be affirmed.

THE STATE, TO THE USE OF JAS. DARLAND, ADM'R. DE BONIS NON, OF LUKE DARLAND, DEC'D. VS. JOHN S. PORTER, GEORGE KAY. & ISAAC COTTON.

1. In an action of debt on the administration bond, against an administrator, who had been removed, brought by the *administrator de bonis non*, for refusing to pay over the monies &c., in his hands, belonging to the estate of the deceased, it is not necessary to shew in a final settlement made by the displaced Adm'r., and an order for payment made thereon by the county court.
2. The 34th section, 1st article of Act of 1835, concerning Administrators, is not restrictive, but merely directs suit to be brought in certain specified cases.
3. The 35th section, same article, gives a remedy under any circumstances.
4. Declaration contained but one count, in which two breaches were set out. One of the breaches being good, will sustain the declaration.
5. The proper remedy in a case where one breach is defective, is to move on the trial to exclude all evidence relating to that breach.

ERROR to Platte.

ISAAC N. JONES, for the Plaintiff in error.

DONIPHAN & BALDWIN, for Defendants in error.

POINTS AND AUTHORITIES.

1. It is not alleged in the declaration that the order of the county court upon Isaac Cotton, the original Adm'r. to pay over the moneys and effects in his hands to the plaintiff, the Adm'r. *de bonis non*—was made upon a final settlement of his, the original Administrator's, accounts. This objection goes to the whole declaration. Revised statutes, p. 44, § 34.

2. The first breach is insufficient in this, that it is not alleged in that

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breach, that said Cotton failed, neglected and refused to deliver the said moneys, credits, promissory notes and effects, to any particular person; and especially it is not alleged, that he failed to deliver them to the plaintiff, but generally, that he failed to deliver them.

SCOTT, J. delivered the opinion of the court.

This was an action of debt, on an administrator's bond, by an administrator *de bonis non*, against the former administrator, (whose letters had been revoked,) and his securities. The declaration contained a single count, in which two breaches were alleged. The first breach charged that the former adm'r failed to pay over the money, effects, and credits in his hands, belonging to the estate of the deceased, without specifying to whom he failed to pay. The second breach alleged, that the former adm'r failed to pay over the moneys, credits and effects in his hands, belonging to the estate of the deceased, to the adm'r *de bonis non*, in pursuance of an order of the county court of Platte county,

A special demurrer was filed to this declaration, which being sustained, and a judgment rendered for the defendants, the plaintiff has sued out this writ of error.

It seems that the objection to this declaration, in the view of the defendants, is, that there was no allegation of a final settlement of the county court with the former adm'r, and hence it is contended, that under the 34th section, of the 1st Article, of the act relative to administrators, no action can be maintained against a former adm'r, until an order for payment is made by the county court, on him after a final settlement.

The 34th section of the said article, does provide that a former adm'r shall pay over the effects in his hands to his successor, at such times and in such manner as the court shall order, on final settlement.

The next succeeding section exacts, that the next succeeding adm'r may proceed against the delinquent and his securities, or either of them, or against any other person possessed of any part of the estate.

The 37th section of the same article provided, that for a failure to make settlement as required by law, the court may revoke an executor's or administrator's letters.

It is certainly the duty of the county court, to make a final settlement with a replaced executor or administrator, whenever it is practicable; and on that settlement to prescribe the times and manner he shall pay over the effects in his hands; and on a failure to comply with such or-

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der, suit shall be brought. It is the duty and the interest of the former adm'r to make this settlement; he should go to the court and require it for his own protection, otherwise in an action on his bond, all the presumptions would be against him, and the slightest evidence of indebtedness to the estate of the intestate, would be sufficient. He would be in little better situation than him against whom the maxim is indulged, *in odium spoliatoris omnia praesumatur*.

It is conceived that the meaning of the 34th section above cited, is, that whenever an order of payment is made on final settlement, and that order is not complied with, suit shall be brought. It was not intended to be restrictive or conveying the idea that suit should be brought only in those cases in which there was a final settlement. It simply intends that when there is a final settlement, and the order of payment made on the settlement is not complied with, suit shall be brought.

To give this section a restrictive interpretation, and that suit cannot be brought after a final settlement with the replaced executor or administrator, is to take away a remedy in all cases. We have seen the 37th section of the 1st article of the act, contemplates a neglect or refusal by the executor or administrator, to make a settlement and provides a penalty; if then after his letters are revoked, he refuses to make a settlement, no action can be brought against him. We think the 34th and 35th sections are entirely reconcilable with each other. The latter section gives a remedy under all and any circumstances against a former administrator. The first only intended that when a final settlement was made and the times and manner of the payment were prescribed by the order of the county court, that suit should not be brought until there was a failure to comply with the terms of the order.

There is but one count in the declaration, containing two breaches of the condition of the bond sued on. The first of the breaches is bad, but the second is good. The demurrer then must be overruled. The 16th section of the 3d article of the act, Regulating Practice at Law, does not reach this case. In cases situated like this, the proper remedy perhaps would be, to move the court on the trial, to exclude all evidence offered in support of the faulty breach.

The other Judges concurring, the judgment will be reversed.

Bogarth vs. Caldwell County.

BOGARTH vs. CALDWELL COUNTY.

A purchaser of school lands, cannot be relieved in equity against the payment of a bond given for the purchase money, on the ground that a majority of the householders of the township did not petition the county court for a sale of the land—nor because sixty days notice of the sale was not given.

APPEAL from Caldwell.

KITRLEY & REED, for the Plaintiff in error.

It is insisted by the counsel for complainant, (Bogarth,) that the circuit court did err in dismissing said bill ;

First, Because he could not have adequate remedy elsewhere.

Second, Because, when said complainant bought said land and executed said bond, it was with the understanding that said sale was in all things legal, and that the sale would be valid to convey to the purchaser a *bona fide* title.

Third, Because, inasmuch (according to the tenor of said bill,) said sale was illegal as above stated, it would be contrary to equity and good conscience to compel said complainant to pay said demand, and would inflict on him an irreparable injury, and because the circuit court sustained the demurrer, when there was equity abundantly set out on the face of the same. See Digest of 1835, p. 562, sec. 1; Story Equity, 2d vol. p. 166, 172.

SCOTT, J., delivered the opinion of the Court.

This was a bill filed by Bogarth for an injunction and for relief against a judgment obtained on a bond given by him for a portion of one of the sixteenth sections in the county of Caldwell. The alleged grounds for relief, are, that the sale was illegal: that a majority of the householders of the township did not sign the petition to the county court, for a sale of the 16th section, a portion of which he became the purchaser, and for which the bond was given on which the judgment was rendered against which relief is sought; that the sale was not advertised sixty days. It is further alleged as a ground of relief, that the land purchased was situated in the county formerly inhabited by the Mormons, and in consequence of their expulsion by the authority of the State, the land purchased has been greatly reduced in value. On a demurrer to this bill it was dismissed, and the cause is brought to this court.

Berry vs. St. Francois county.

The allowance of a defence of this character to a purchaser of the school lands, would be attended with the most disastrous consequences. The party has all he acquired by the purchase, is in the uninterrupted possession of the land, and not threatened with any suit or litigation respecting his title, and yet asks that his agreement may be rescinded, as the sale was not conducted according to law.

Whether sales of the 16th sections are judicial sales, in the sense which would protect purchasers from the consequences of irregularity in the proceedings of the court ordering them, it is not necessary now to determine. We are not apprised of any principle by which such a proceeding as the present can be sustained. It is not pretended that a knowledge of the illegality of the sale has been acquired since the purchase was made; and even if such a pretence was set up, it is not seen how it could be sustained, as information as to its regularity could have been as easily obtained before as after the sale. The party was willing to embark, according to his own showing, in an illegal speculation, makes a venture, wins a prize, and because it afterwards deteriorates in value, he asks a court of equity to relieve him from the consequences of his own folly. This case, in principle, is the same as that of *Brown vs. Crawford county*, 8 Mo. R. 640.

The party can scarcely be serious in asking for relief on the ground that his land has been reduced in value in consequence of the expulsion of the people called Mormons, by the authority of the State.

The other Judges concurring, the decree will be affirmed.

BERRY vs. St. FRANCOIS COUNTY.

1. Where a prisoner is conveyed from one county to another on a change of venue, in a criminal case, the latter county is bound for the cost of the prosecution which may be taxable against a county, in the same manner as if the cause had originated in such county.
2. Where guards are summoned for the safe keeping of a prisoner confined in jail, the county court has no power to refuse to allow the costs, for the reason that the jail was sufficient. The law vests the direction of employing guards in certain officers, and their discretion cannot be questioned by another tribunal.

APPEAL from St. Francois.

COLE, for the Appellant.

Berry vs. St. Francois county.

Scott, J., delivered the opinion of the court.

John Layton was indicted for murder in the county of Perry, and afterwards the cause was removed, by a change of venue, to the county of St. Francois. Whilst Layton was confined in the jail of St. Francois county, a guard was employed for his safe keeping. Layton was convicted and executed. The account of the guard was allowed by the circuit court of St. Francois county, but upon the presentation of it to the county court of that county, its payment was refused. On proceedings on mandamus, the circuit court sustained the judgment of the county court, and Berry has brought his cause to this court.

It seems that the grounds assumed by the county court for refusing to pay the demand, were, that the county of Perry and not St. Francois county, was laible for the expense of the guard, and that the jail of St. Francois county was sufficient.

The question to be determined first, is which of the two counties is liable to the expense of the guard? The law makes it the duty of each county in this State to build, and keep in repair, a good and sufficient jail. Whenever any expense is incurred in consequence of there being an insufficient jail in a county, that is a county and not a State burden. The law making it the duty of every county to build a jail, some counties have incurred that expense, and it would be manifest injustice to those counties which have built jails, to take the common funds and apply them to the payment of expenses incurred by the neglect of a county to build and keep in repair a sufficient jail. The object of the law in requiring a jail to be built, is, that there may be a place of confinement whenever imprisonment is imposed on an individual. Counties are to keep jails for the confinement not only of those who commit offences within their respective limits, but for the imprisonment of all those who are detained by authority of law within their several boundaries. When a cause is removed from one county to another, by a change of venue, it is as much a cause of the county to which it is removed, (so far as the present question is involved,) as if the indictment had been found in it; and there is as much justice and propriety in making the latter county pay the expense of a guard as if the offence had been committed within its limits. The county to which a cause is removed to-day, may in its turn to-morrow send a cause to the county from which one has been received. The injustice in making the county of Perry liable, is obvious. That county may have had a jail entirely safe; the cause is removed from it without its consent, and without its fault, yet it is to be mulcted with the expense of a guard, merely be-

Caldwell vs. Lockridge.

cause the offence was committed within its limits, when that offence may have been perpetrated by an inhabitant of the county to which the cause is removed. Perry county then is not liable for these costs, and we have seen that the State cannot be, under any circumstances. St. Francois county then must be. In forming this opinion, the case of the county of Perry vs. John Logan, has not been overlooked. In that case it does not appear whether the prisoner was removed from one county to another for safe keeping only, or by a change of venue. If for the former cause, we should be loath to hold, that the county to which he is removed would be liable for the expense of a guard, (if such a case would occur.) If for the latter, then we are clearly of the opinion, that the county to which the cause is sent, is liable for the expense. 4 Mo. R. 433. The State vs. Hinckson, 7 Mo. R. 353.

As to the objection that the jail of the county of St. Francois was sufficient, we are of opinion that such an inquiry is precluded from the examination of the county court. The law entrusts a discretion to certain officers to authorize the employment of a guard, under particular circumstances; when that discretion is exercised, and the expenses of a guard have been incurred on the faith of an order of those officers, the propriety of the exercise of that discretion cannot be questioned by another tribunal.

The judgment will be reversed and the cause remanded, the other Judges concurring.

CALDWELL vs. LOCKRIDGE

1. A settlement made by an administrator, has the force of a judgment. A balance on such settlement, may be found in his favor, without his having made oath or affidavit as required in cases of demands presented against an estate.
2. A *scire facias* is not necessary to revive a judgment of a county court. It is not a court of common law jurisdiction.
3. At the November term, 1838, the administrator having given legal notice, made a final settlement of the estate, had an allowance of \$190 42, and resigned his administration. At the same term, but without notice to the administrator, the court set aside the allowance, and upon a new settlement found a balance of \$101 53 against the administrator.

Held:

1. After settlement, and resignation of his office, the administrator was no longer in court.
2. The county court had power during the term to vacate any order made at that term, but could only do this, after notice to the administrator.
3. The order setting aside the allowance, having been made without any notice to the administrator, is void.

Caldwell vs. Lockridge.

ERROR to Jackson.

R. G. SMART, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The final settlement made by Caldwell in 1838, was in every respect in conformity with the law, and from the time of his resignation all his powers then ceased. Revised Statutes 1835, title, Administration, 1st art. sec. 30 & 31.

2. The decision of the county court made at the February term, 1845, in ordering Rachel Lockridge, administratrix, to pay the amount due Caldwell on his final settlement as administrator of Jones Lockridge, deceased, made in 1838, was right and proper. See Revised Statutes of 1835, title, Administration, art. 5, sec. 11, 12, 13 & 14, p. 58, 59. And further, that as soon as Caldwell had made his final settlement and resigned his letters of administration, his powers then ceased, and he was no longer in court, and the court had no further control over him, and any order made by them affecting his rights, was null and void.

3. That the second order of the county court, made in 1838, rescinding *a part* of the final settlement of Caldwell, was null and void, the same having been done without notice to Caldwell, and the whole proceeding an *ex parte* one. See Monroe's Ky. Rep. 5 vol. p. 58; 7 Mo. R. p. 465, Smith vs. Ross & Strong.

4. The allowance made to Caldwell at his final settlement by the county court, in 1838, being warranted by the law, and being such an allowance as the court had a perfect right to make, the only way by which the opposite party could take advantage of the same, was by an appeal to the circuit court. See Revised Statutes of 1835, title, Administration, 15th sec. 6 art; also 7 art. 1st sec.

5. The circuit court erred in dismissing the suit in that court, as a new trial should have been had, in case the county court erred in the decision it made. See 8th art. of Administration law, sec. 8.

HALL, for the Defendant in error.

POINTS AND AUTHORITIES.

1. The notice that plaintiff would move the court for an order requiring defendant to pay the amount of the first order, was altogether an informal proceeding in this cause.

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2. The order of the Jackson county court, made at its November term, 1838, offered and read in evidence by the plaintiff, Caldwell, is to all intents and purposes a judgment of the court, and as such could only be enforced, after *scire facias*, there being no evidence that execution had been sued out upon it within a year and a day after its rendition. See McKinney's admr. vs. Davis, 6 Mo. R. 501; 1 Mo. R. p. 368, Dowsman vs. Potter; 1 Tomlin's Law Dictionary, p. 707; 3 Mo. R. 307; 2 Bac. Abr. 727; 7 Mo. R. 469, Gamble admr. vs. Hamilton admr.

3. The county court had power to rescind the first order upon motion, as it was done at the same term at which it was made (June.) Had the court a right to enter up another order at the same term at which the preceding one was rescinded? See Rev. Statutes Mo. 1835, p. 469; 7 Mo. Rep. p. 320, Ashby vs. Glasgow and others; See also, Bouvier's Law Dic. title, "Term;" also Jacob's Law Dic. title, "Judgment."

4. The first order having been rescinded properly, it was clearly incompetent testimony to warrant the proceedings of the county court, at its term for March, 1844.

5. If the county court erred in rescinding the first order, and entering up the second order, Caldwell could have appealed to the circuit court. Rev. Stat. Mo. p. 63.

6. That as all the pleadings in the county court, by statute, may be "*ore tenus*," the various motions, appearances, testimony, &c., necessary to warrant a judgment in that court, will by a higher court be presumed, unless it otherwise appear by bill of exceptions. Rev. Stat. p. 56.

HICKMAN, for Defendant in error.

POINTS AND AUTHORITIES.

1. Upon the trial of the appeal from the county court, the circuit court committed no error in reversing the judgment of the county court, and dismissing the case for want of sufficient notice. See Rev. Statutes p. 55 & 56, secs. 5 & 17; and 5 Mo. R. 334.

2. The notice and motion of plaintiff in county court, shows that his claim is founded on a judgment of said county court, and therefore he should have resorted to his writ, of *scire facias*, and not attempt to enforce the collection of said judgment, nor to obtain another one by motion. Rev. Stat. p. 56, sec. 8. Also 6 Mo. R. p. 501.

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3. The county court erred in giving judgment in favor of the plaintiff, Caldwell, because, 1st, He had not made oath or filed an affidavit with his claim, as required by law. Rev. Stat. p. 56, sec. 9; and, 2d, Because the judgment entered up was not against the assets of Lockridge, dec., in the hands of his administratrix to be administered; and the circuit court having, in reversing the judgment of said county court, decided in favor of the right party, the supreme court will not now interfere with its decision. 6 Mo. R. p. 250, 469; 7 Ib. 419.

SCOTT, J., delivered the opinion of the court.

Oliver Caldwell and Rachel Lockridge were appointed administrator and administratrix of the estate of Jones Lockridge, deceased. At the November term of the Jackson county court in 1838, Caldwell having given the requisite notice, made a settlement of his accounts and resigned his letters of administration. At this settlement, the court allowed Caldwell a commission of 6 per cent. on the estate, amounting to \$536 21. The settlement left the estate indebted to Caldwell \$190 42, and an order was made directing the administratrix to pay him that sum. Afterwards at a subsequent day of the same term, an order was made correcting the former order, disallowing the amount of the commission allowed by that order. The effect of the correction was to bring Caldwell \$101 53 in debt to the estate. This order was made without any notice to Caldwell. Afterwards in January, 1845, Caldwell gave the administratrix notice that at the next February term of the Jackson county court, he should move for an order requiring the administratrix to pay him the amount allowed him by the court, at the November term, 1838, when he resigned his letters of administration. The county court made the order accordingly. From this order an appeal has been taken to the circuit court, where the following judgment was entered: "Now at this day came the parties aforesaid by their attorneys, and the motion to dismiss the appeal heretofore filed, is taken up, which being seen and heard, and by the court fully understood, is by the court overruled; and thereupon neither party requiring a jury to try the issue herein, all and singular the premises are by them submitted to the court, which being seen and heard and by the court fully understood, the court hereby reverses the judgment of the court below, and for want of sufficient notice to said defendants, it is ordered that the cause be and is hereby dismissed." From this judgment an appeal was taken to this court.

In the first place, it will be proper to notice the nature of the order

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made by the county court at the November term, 1838, requiring the administratrix to pay to Caldwell \$190 42. From the argument of the cause, and the references made, it seems to have been regarded by the defendant in error as nothing more than the demand against the estate, which must be exhibited and allowed like all other debts against a deceased person's estate. This certainly is an erroneous view of the subject. When an administrator makes his settlement, and a balance is found for or against him, that settlement has the force of a judgment. It is precisely on the footing of all other allowances against an estate, and its payment may be enforced in like manner. A court would not permit an executor or administrator to resign, who was in arrears to an estate, until the balance against him had been settled. He would not thus be permitted to escape the control of the court in coercing the payment of the debts he may owe the estate.

There is no foundation in law for the idea that a *scire facias* was necessary to revive the judgment rendered by the county court at the November term, 1838. Whatever may be the law in regard to the necessity for such writs to revive judgments after a year and a day in courts proceeding according to the course of common law, there is no pretence that such laws are applicable to allowances made against estates in our county courts. By the common law, a judgment against an executor or administrator was an admission of assets sufficient to satisfy it. If suits were instituted on claims, and there were no assets to satisfy them, upon *plene administravit* pleaded, a judgment of assets *quando acciderint* was entered, on which execution could be issued when it was shewn by proceedings on *scire facias* that assets had subsequently come to the hands of the executor or administrator. All claims against an estate are by our laws permitted to be matured into judgments without regard to the means of satisfying them or to the solvency of the estate. There is no such thing as a judgment *quando acciderint*. After a few preferred debts, their class depends upon the time within which they are exhibited. The state of the accounts of the executor or administrator is always known to the courts, and an allowance may be made, and years may elapse before the courts will make an order directing its payment, because from the situation of the assets of the estate, it is seen that there is no money in the hands of the executor or administrator applicable to its payment. The necessity of a *scire facias* arose from the presumption that after a year and a day, a judgment was satisfied. Having a right to an execution during that time, the law contemplated that it would be resorted to in order to obtain satisfaction. But where an execution was stayed by writ of er-

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ror or an injunction, the presumption of payment did not arise and no revival of the judgment was necessary. In our county courts, when a judgment is rendered against an estate, the party cannot take out execution, without the order of the court, and the court may, and frequently does refuse to make an order to pay an allowance until the year and a day have elapsed, being governed in making such orders entirely by the situation of the accounts of the executor or administrator.

The cause turns on the legality of the action of the county court at the November term, 1838, in correcting the previous order of the term, without notice to Caldwell. Caldwell having made a settlement of his account and resigned his letters of administration, could he have been considered in court any longer, for any purpose? There are authorities for the position that parties are considered in court for a year and a day after judgment, that being the period within which execution may issue upon it. There is no doubt of the principle, that during the term all the proceedings are in the breast of the court, and they may be altered or vacated, as justice requires. The doctrine that the parties are to be presumed in court for a year and a day after judgment, was repudiated by this court in the case of *Laughlin et al. vs Fairbanks, Lisle & Edwards*, 8 Mo. R. 367. In that case this court held that the circuit court acted erroneously in setting aside the return endorsed on an execution, without notice to the defendants, and it was further held that in every case of a special motion unless there has been an express or implied waiver of notice, the want of such notice would of itself be sufficient to vitiate the proceedings. Now, whatever may be the law applicable to cases in courts possessing common law jurisdiction, and whose proceedings are in conformity to that law, as was the case above cited, it is manifest that the proceedings in the county courts, in the settlements of accounts of administrators are entirely dissimilar from the course of practice in causes pending in courts of common law. In every suit there must be an *actor* and *reus*. When an administrator comes into court to make a settlement, it cannot with any propriety be said that it is a step in a cause. True any one interested may, in suitable cases, except to the action of the court in making such settlements, and prosecute an appeal to the circuit court, but the settlement may be made without any exception being taken, how then can it be said to be a step in a cause? When a court proceeding according to the course of the common law enters an erroneous final judgment, that judgment may be reversed by a writ of error in a superior tribunal. Not so in proceedings in the county courts. A writ of error does not lie on a final judgment in these courts. The party com-

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plaining of any order or proceeding therein, must take the steps required to correct that error of the court at the time it was committed, otherwise he is remedeless in an appellate tribunal. In the case now under consideration the administrator, Caldwell had given the regular notice of his intention to resign his letters. He appeared in pursuance of that notice, made a final settlement, and resigned. On what principle could it be said that he was in court after that time for any purpose? Beyond all question the county court during the term had authority to vacate the order that had been made. But that only could have been done according to the principles of justice. No one could be affected by proceedings of which he had no notice. It is a principle of universal justice, that a judgment against a party, without notice of the proceedings is purely void. Although the court may have jurisdiction of the cause, yet if the defendant is not affected with notice of the proceedings, he is not bound by them. When the motion was made to correct the former order, if there was no time during the term to bring in Caldwell by notice, the motion might have been continued and notice given in vacation; and in that way the court would have retained control of the matter. The order obtained by Caldwell was after the notice required by law. That subsequently obtained was without any notice to him. Now, if one or the other of these orders only can stand, how can we hesitate, according to the principles of justice, in determining which shall obtain? It is in vain to say that Caldwell might have appealed. He could only have appealed by being in court during the term, at or after the time at which the order was made, and his complaint is, that the order was made when he was not in court, and when he had no notice that it was necessary to be there. The case of *Smith vs. Rice*, 11 Mass. R. 507, is one involving the propriety of an order made by a probate court, which affected a person who had no notice of the proceedings. The case is very similar to the one under consideration, and a portion of the opinion is transcribed as showing the views entertained by an able tribunal on this question? "It was said in the argument that as the judge of probate had jurisdiction of the cause, his decree is conclusive; and that the only remedy of the demandant, if aggrieved, was by appeal. This is undoubtedly true in cases where the probate court is acting within its jurisdiction and pursuing the course prescribed by law; if in such a case there is an indiscreet exercise of authority, the only remedy is by appeal. But in the case at bar the very grievance complained of is, that the party had no notice of the pendency of the cause, and of course no opportunity to appeal. Any party aggrieved by the judgment of a justice of the

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peace or of a court of common pleas, may appeal if he has had due notice of the suit, and when he has had an opportunity to appeal and neglects it, he cannot afterwards bring a writ of error on such judgment. But if judgment has been rendered on the default of the defendant, without any appearance by him and without a sufficient service of the writ, or in the court of common pleas if a sole defendant be out of the State, and judgment be rendered against him, without the continuance required by statute, the defendant may reverse the judgment by writ of error. So if the party die before judgment rendered against him, his executor may reverse it on error. And in all these cases, it is no objection to the writ of error that the cause was open to appeal, inasmuch as the plaintiff in error had no opportunity to avail himself of that remedy."

"It is then very evident that if the proceedings in the probate court were according to the course of the common law, the decree in question might be reversed for the error before mentioned. But no writ of error lies to the probate court. Their proceedings not being according to the course of the common law, a party situated like the present demandant has no means of revising the decree and causing it to be annulled or reversed so as to prevent its being produced against him in another cause. He has then a right when it is so produced, to aver and prove its nullity." The other Judges concurring, the judgment is reversed and the cause remanded.

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1. Under the Act of 1798, of the State of Kentucky, which authorizes a party to liberate his slaves, by an instrument of writing under his hand and seal, attested and proved in the county court by two witnesses, or acknowledged by the party in the court of the county in which he resides, the act of the court in receiving and determining the sufficiency of the proof, or in taking the acknowledgment, is a judicial act, and will be regarded as such in the courts of this State.
2. Where a deed of manumission was executed, and acknowledged by an Attorney, it is not necessary that the record should shew the proof of the execution of the power of attorney, but the order of the court, before which the deed was acknowledged, is conclusive as to the sufficiency of the proof of the execution of the power.

APPEAL from Howard.

BELT & CLARK, for Appellant.

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POINTS AND AUTHORITIES.

The plaintiff insists that the judgment was "erroneous, and should be reversed, for the following reasons :

1. The circuit court erred in excluding from the jury, the record offered in evidence by the plaintiff, from Hart county court, in the State of Kentucky. See Laws of U. S. May 26, 1790, ch. 11; Ferguson vs. Hartwood, 7 Cranch 408.

The only issue under the pleadings presented on the record was the *assault and battery*, and under the plea of *not guilty*, court erred in rejecting said record. See Carney vs. Hampton, 3 Monroe's R. 228; Talbot vs. Williams, 2 Mar. 203, 4; J. J. Mar. 105-6. If defendants justify imprisonment because plaintiff was a slave, they should have plead *specialty*; Wheaton's Selwyn, Title, Assault and Battery, vol. 1, Ibidum, Title, False imprisonment, vol. 2, 917; Chitty's pleadings, vol. 1, 539-40, 744.

2. Any instrument in Kentucky, emancipates slaves. See the Digest agreed upon by counsel, in the bill of exceptions, Laws of 1800; also 2 J. J. Marshall 230; Fanny vs. Dejarnett's heirs, 3 Marshall's R. 495-6; Winney vs. Cartwright.

3. Court erred in rejecting the record in connexion with the testimony of Jesse Atterberry; and also in permitting Jesse Atterberry to testify, and then excluding his testimony from the jury.

By his (Atterberry's) testimony, it appears that Maria had acted as a free person some years before the death of Thomas Atterberry, dec'd. Administrator is, in law, presumed to know this, and placed on same ground as assent of adm'r to a legacy. See Nancy vs. Snell, 6. Dana 154; Lord Saye & Sele vs. Guy, 3 East. 131; Duppa vs. Mayo, 1 Sand. 278; 5 Coke's Rep. 12, b; Chamberlain vs. Chamberlain, 1 Chancery cases, 256; Bastard vs. Stuckey, 2 Lev. 209. When the assent is once given, it is irrevocable; Paamour vs. Yardley, Plowden 539; Young vs. Holmes, 1 Strange 70.

4. By the laws of Kentucky, the certificate of emancipation is evidence, when uncontradicted, of freedom, and by the laws of the U. S. all records of other States have the same effect in sister States, as at home; hence court erred in excluding a copy of the certificate of emancipation, in connexion with the testimony of Sashel Bynum.

5. Court erred in excluding from the jury the admission of Thomas Atterberry, dec'd. in his life time, that Maria was a free woman, and that he had freed her in Kentucky, and she had her free papers with

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her. This admission operates as an *estoppel* upon the representatives or the deceased.

6. Court erred in refusing to set aside non suit, and grant a new trial to plaintiff.

LEONARD, for Appellee.

POINTS AND AUTHORITIES.

1. The plaintiff having been originally a slave in Kentucky, and claiming her freedom under the laws of that State, could only acquire it by the deed, or last will of her master, executed in the manner prescribed by the laws of Kentucky, to give it validity as an instrument of manumission, and the county court having no duty to perform, in relation to the instrument, other than to take the proof or acknowledgment of its execution, neither the order declaring that the acknowledgment had been taken, nor the certificate of freedom issued by the clerk, made out any title in the plaintiff to freedom. It devolved on her to show a deed of manumission from her master, executed with the formalities required by the statute, and nothing short of such a deed could go in evidence to the jury, to establish in her a right to freedom. *Talbot vs. David*, 8 Mar, 608; *Donaldson vs. Judge*, 2 Bibb 57.

2. When a deed of manumission is executed under a power, both the deed and the power must be attested and proved, or acknowledged in the manner prescribed by the statute. It is not sufficient that the deed is only attested, and proved or acknowledged, if the power be not so also; nor is it enough that the power is duly executed, if the deed be not in like manner executed with all the formalities required by the law. These formalities must be observed in relation to each instrument, the power, and the deed—any other construction would in effect repeal the statute. Now, here the order of the Hart county court, of April, 1837, even if read as the appellant desires, only establishes, that an acknowledgment of the execution of the deed was made in court, while there is no evidence whatever, of the proof by witness, or of the acknowledgment by the grantor, of the execution of the power.

3. The alledged deed of emancipation was not entitled to go to the jury, upon the proof or acknowledgment taken in the Hart county court, and there being no other proof of its execution, it was properly rejected for want of such proof.

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4. Although the opinion of the circuit court, ruling out the paper offered in evidence, as the will of Thomas Atterberry, without any probate or any proof whatever of its execution, was excepted to below, that matter will not, it is presumed, be relied on here for error.

Scott, J., delivered the opinion of the court.

This was a suit for freedom brought by Maria, against Atterberry. Maria took a non suit, and after an unsuccessful motion to set aside, and for a new trial, has brought the case here by appeal.

In support of her right to freedom, Maria offered in evidence a transcript from the record of the county court of Hart county, in the State of Kentucky, authenticated in pursuance of the act of Congress of the 27th April, 1804. The act of liberation in the record, is in these words: "Thomas Atterberry, sen'r. of Hart county, by Richard Atterberry, his attorney in fact and agent—a deed of emancipation from Thomas Atterberry, freeing a certain negro woman by the name of Maria, aged — years, five feet high, rather a yellow black, weighing about 120, investing the said negro woman with full freedom, which deed of emancipation is acknowledged in open court, and it is ordered that the clerk issue to said woman a deed of emancipation according to law." Power of attorney from Thomas to Richard Atterberry: "Know all men by these presents, that I, Thomas Atterberry, of Hart county, State of Kentucky, do make, constitute and appoint Richard Atterberry as my Attorney in fact, to *alien*, release and set free, my negro woman named Maria, and to assign my name as her security, that she don't become chargable to the county aforesaid, and to do singularly and severally, and every act necessary for to be done for the emancipation of said slave, that I could do in my own person, which when done shall be as valid in law, as if I had done it in my own proper person. Given under my hand and seal this 9th day of April, 1837.

THOMAS ATTERBERRY. [*seal.*]

Teste,

ROBERT DORSEY & P. WELLS.

The following is a copy of the deed of emancipation referred to in the before recited order of court:

"I, Thos. Atterberry, sen'r, of Hart county, Kentucky, have this day, and doth by these presents emancipate and forever set free, my negro woman slave, Maria, to go out and forever free, and to have and

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enjoy all the rights and privileges of a free woman of color. Given under my hand and seal, this 10th day of April, 1837.

THOMAS ATTERBERRY. [*seal.*]

By Richard Atterberry, his Agent and Attorney in fact."

Both of the foregoing instruments were certified, and have been recorded.

A certificate of emancipation made out by the clerk, in pursuance of the order of the court, follows in the record, the entry of these instruments.

The record was authenticated as before said, under the act of Congress of 27th April, 1804. Objections were made to the reading of the record in evidence, and the same were sustained by the court.

The certificate of freedom granted in Kentucky, was recorded in Howard county, in this State, and a copy of this record in connexion with the testimony of the recorder, was offered in evidence, the original certificate having been lost.

The testimony going to show that Thomas Atterberry had frequently declared that Maria was free, and that he had liberated her in Kentucky, was also offered in evidence. Also a will of Atterberry, liberating Maria. This will was without probate, and no evidence was offered in proof of its execution by the testator. All this evidence was rejected on the trial, and the rejection thereof, is the error complained of.

It was agreed that the laws of Kentucky, in relation to the emancipation of slaves, might be read in evidence in this court, although not spread upon the record.

An act of the Kentucky legislature of the 27th February, 1798, provides that it shall and may be lawful for any person, by his or her last will and testament, or by any other instrument in writing under his hand and seal, attested and proved in the county court by two witnesses, or acknowledged by the party in the court of the county where he resides, to emancipate, or set free his slave, who shall thereupon be entitled, and fully discharged from the performance of any contract entered into during his servitude, and enjoy his full freedom, as if he had been born free. And the said court shall have the power to demand bond with sufficient security of the emancipator, for the maintainance of any slave that may be aged or infirm, either in body or mind, to prevent him from becoming chargeable to the county; and every slave so emancipated shall have a certificate of his freedom from the clerk of such court, on parchment, with the county seal affixed thereto.

A statute of the same State, of the 15th December, 1800, provides

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that every person of the age of eighteen years, being possessed of, and having a right to any slave or slaves, may, by his last will and testament, or by an instrument of writing, emancipate such slave or slaves.

It was contended by the appellee, Atterberry, that the appellant, Maria, could only obtain a right to freedom by showing a compliance with the terms of the statute, by which the mode of acquiring it is prescribed. That the court having nothing to do but barely receive the evidence in proof of the execution of the instrument or its acknowledgment, neither the order declaring that the acknowledgment had been taken, nor the certificate of freedom issued by the clerk, made out any title to freedom. That her right to freedom could only be established by the production and proof of a deed executed with the formalities required by the laws of Kentucky.

The case of Talbot vs. David, decided in Kentucky, in 1810, 2 Mar. R. 608, is cited in support of this view of the case. In the cause referred to, two orders were given in evidence. One of them was in these words, "February court, 1810. On motion of Jesse Griffith, ordered, that Jack, aged 29 years, Jane, aged 25 years, and George, aged 21 years, his slaves he manumitted and set free, agreeable to a deed which said Griffith has filed." The other was as follows: "Feb'y. term, 1810. On motion of Jesse Griffith, ordered that Jack, aged 29, Jane, aged 25, and George, aged 21, are manumitted." The court before which the cause was tried on these orders, and some parol evidence not affecting the question, instructed the jury that they were bound from the record to presume a deed of emancipation from Jesse Griffith to Jane, the slave above named, who was the mother of the plaintiff, David, duly executed. This instruction was deemed erroneous. The court of appeals holding, that the first of the above recited orders having been made by the clerk in a book unknown to the law, and unauthorized by it, was of no validity. With regard to the last order, the court after referring to the act of 1798, relative to the liberation of slaves, says, to effect the emancipation of slaves, that the requisites of this act must be complied with, there can be no question. But we are of opinion that the act cannot, upon any rational principle of interpretation, be construed to require of the court an order of manumission, to effect the liberation of a slave. The owner is the only person capable of releasing his slave from bondage, and the law has prescribed the mode by which it may be done, but the only act for the court to perform, is, to receive proof of the execution of the will or deed, by which the manumission may be effected. To give to the act of the court, in taking the proof, any *judicial effect*, it is true it is essential that an en-

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try should be made in court, but *immediately upon that being done*, and without any order of manumission, the slave becomes *ipso facto* free, and released from all obligations of servitude.

Hence the court held, that the county court having no authority to make an order manumitting a slave, although there was a propriety in the law, presuming that to having been done correctly which is done by a court of competent jurisdiction, it cannot be conclusively inferred from such an order on the records, that a deed of manumission has been duly executed. But the court held, that even such an order was evidence to be left to a jury in proof of the existence of a deed of emancipation, the weight of which was to be ascertained by them. So this case only determines that an order of emancipation by the county court, is not necessary to confer freedom, and the law will not conclusively presume from the existence of such an order on the records, that a deed of emancipation has been duly executed. But the case is a very strong one in favor of the plaintiff. It shows that where a proper order is made by the court, that order is a judicial act. Indeed it cannot be pretended that the deed of emancipation, under the act of 1798, is effectual without the action of the court. The deed must be attested by two witnesses, and proved or acknowledged in open court, without which freedom cannot be imparted. The court must determine whether the proof or acknowledgment is sufficient. It is not bound to receive and record whatever proof or acknowledgment is offered, but the sufficiency of that which is offered, is judged of by the court, and this exercise of the judgment in determining its sufficiency or insufficiency, is a judicial act. It is not like the case of a deed for lands which passes title without any proof or acknowledgment and recording, formalities which are exacted merely for the protection of purchasers and creditors. The case of Talbot vs. David, cannot be read without coming to the conclusion, that had the order of the county court been formal, and contained the necessary facts, it would have been deemed conclusive as a judicial act, as to the right of David to freedom. If the entry in this case containing an acknowledgment of the deed of emancipation, would have been regarded as a judicial act by the courts of Kentucky, it is clear it must be so regarded here; and if such an entry there, would shew a right to freedom, the same entry properly authenticated would be as good evidence in our courts. This view of the subject answers the objection that the power of attorney should be shown by the record to have been proved or acknowledged; for, adopting the language of the court in the above case, that there is a propriety in the law, presuming that to have been correctly done, which

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is done by a court of competent jurisdiction, we cannot suppose that the court would have made an entry, that Thos. Atterberry, sen., by his attorney in fact and agent, acknowledged a deed of emancipation, unless it had been satisfied that the attorney in fact had been properly constituted. Indeed, if any aid was wanting to a presumption so reasonable, it would be found in the fact that the power of attorney, and deed of emancipation, are found in the record immediately following the order of court, and it appears that they were contemporaneously recorded. Other cases may here be referred to, showing that we are warranted in saying that the taking of the acknowledgement of an instrument is a judicial act. Where the acknowledgment or record is the act of a court, and partakes of the nature of a judicial proceeding, it has been treated as within the law of Congress of May 26, 1790. In Kentucky a power of attorney was produced, purporting to have been executed by the plaintiff in Virginia, it had been acknowledged by the plaintiff in the county court of the latter State, and the acknowledgment ordered to be certified. It was held that the record of the acknowledgment and order duly certified under the requisitions of the law of Congress, above referred to, sufficiently proved the execution of the power without further evidence, and this although the power itself had not in fact been recorded. *Rochester vs. Toler*, 4 Bibb. 106. A copy of a deed acknowledged in a court of a neighboring State, and recorded there, was held to come within the act of Congress, in *Strode vs. Churchill*, 2 Lit. 75. So this court has held that the probate of a will in another State, is a judicial proceeding. The same has been held in Louisiana, *Balfour vs. Chew*, 5 Mar. N. S. As to the question what effect these records are to have when used in other States, without showing their force in the State where they are created, it does not seem to be settled. In Louisiana it has been held, that if a copy of a similar record would be admissible for any cause, it will be held equally so, when coming from another State, unless the *lex loci* giving it a different effect, be affirmatively shown. *Norwood vs. Green*, 5 Mar. Lou. The contrary was held in Alabama. *Mitchell vs. Mitchell*, 3 Stew. and Porter. So it seems is the law in Indiana. *Elliot vs. Ray*, 2 Black. 31. And this seems to be in consonance with what was said by this court in the case of *Wilson vs. Mann*, 8 Mo. R. 1, that the court of one State will not take judicial notice of the statute laws of a sister State, but on common law question, the common law of a sister State will be presumed like that which prevails in this State. This question however does not arise in this case, as the laws of Kentucky in relation

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to this matter, are in evidence before us, and for the reasons before given, we are of opinion the record would be evidence in her courts.

The record in this case was authenticated under the act of 26th May, 1804. It being a judicial act, it should have been authenticated under the act of 27th April, 1790. One of the Judges is of the opinion that the authentication under the act of 1804, would be a good authentication under the act of 1790. The court not being full, and we supposing from the nature of the suit, and no objection being made to the authentication, that the parties are anxious for a trial on the merits, the judgment will be reversed and the cause remanded.

We will observe that this opinion has been formed after mature consideration of the cases of *Winney vs. Cartwright*, 3 Marshall 493, and *Dejarnett's adm'r vs. Fanny*, 2 J. J. Mar., which arose under the before recited act of 1800. Moreover, let it be borne in mind, that the case of *Talbot vs. David*, which was cited by the appellee, was decided long after the act of 1800 took effect, and the deed of emancipation and order were made after that event.

Judge McBRIDE concurring, the judgment is reversed.

Judge NARTON did not sit.

THOMAS & THOMAS vs. RELFE, ADM'R OF HUNTER.

A note given to "R. administrator of the estate of H. dec'd," is the individual property of R. The words "administrator, &c." are a mere *descriptio personæ*.

APPEAL from Washington.

COLE, for the Appellee.

SCOTT, J., delivered the opinion of the court.

Moses and Reuben Thomas executed their joint note to James H. Relfe, *administrator of the estate of M. T. Hunter, deceased*, and in an action on that, set up the defence that the letters of administration granted to the said Relfe on the estate of the said Hunter, had been revoked. The question is, whether such a defence is admissible.

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The point in this cause was involved and considerably discussed in the case of *Lecompte vs. Sargeant*, 7 Mo. R. 351. This court then held that notes of the character of those on which this suit is brought, were the individual property of him to whom they were payable, and that the term *administrator* on their face was a mere *descriptio personæ*. It is obvious that no proof of letters of administration would be required in a declaration on a note of this character. How then can the repeal of the letters of administration affect the right of Relfe to this note?

So, in the civil law, an administrator can novate the debt of his intestate, and make it his own. *Turnbull vs. Freret*, 5 Martin's Lou. Rep. 703.

The other Judges concurring, the judgment will be affirmed.

OCTOBER TERM, 1845.

VAUGHN vs. THE BANK MISSOURI, GARNISHEE OF SILAS REED.

The decision of the circuit court, sitting as a jury, will not be set aside, unless the court were called on to decide some question of law, and erred in its decision.

ERROR to St. Louis Court of Common Pleas.

TODD, for Plaintiff in Error.

POINTS.

1. The words "Surveyor General," to the name of Silas Reed, in his account with the Bank, and him used in drawing checks, were mere "descriptio personæ," and could not operate to give any official character to the money to his credit under that style in the Bank. (7 Mo. Rep., p. 351, 298; 9th Mo. Rep., p. 169.)

2. The evidence shows that when the Bank was garnisheed, the Bank owed Silas Reed \$1,644 72.

POLK, for Defendant in error.

1. The Bank by her counsel submits, that this cause having been submitted to the court sitting as a jury, and no instructions having been asked, nor the court asked to declare what the law of the case was at the trial, the only question of law that can be raised on the record is, whether the court below erred in refusing to grant a new trial? See Davis vs. Scripps, 2 Mo. Rep. 189; Polk vs. the State, 4 Mo. Rep. 544. Von Phul vs. the City of St. Louis, 9 Mo. Rep. 49; and McEvoy, to use, &c., vs. Lane & McCabe, 9 Mo. Rep. 48.

2. The Court of Common Pleas committed no error in refusing to grant Vaughn a new trial, for there was evidence on the part of the gar-

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nishee sufficient to warrant a finding of the issue in her favor. In the first place there was the answer of the garnishee, which this court has decided to be admissible as evidence; and in the next place there was the testimony of H. L. Clark, fully corroborating the answer. Davis, garnishee of Flemming, vs. Knapp and Shea, 8 Mo. Rep. 657. McEvoy, to use, &c., vs. Lane & McCabe, 9 Mo. Rep. 48-9.

But this court, in its own language in the case of Mullikin vs. Greer, 5 Mo. Rep. 493, "will never reverse a judgment of the circuit court for refusing a new trial, unless the evidence of the person demanding the new trial strongly preponderates." See also Singleton, to use of Gibbs, vs. Mann, Adm'r., 3 Mo. Rep. 326. Oldham vs. Henderson, 4 Mo. Rep. 295. Dooley vs. Jennings, 6 Mo. Rep. 63. Young vs Kelly, 9 Mo. Rep. 51.

And further upon the facts preserved in the bill of exceptions in this case, the sum of money in question, in point of law, was the property of the U. S. and not of Silas Reed. U. S. vs. Buford, 3 Peters 13. Jones vs. Le Tombe, 3rd Dallas 384. Hodgson vs. Dexter, 1 Cranch 345. 1 T. R. 172.

McBRIDE, J., delivered the opinion of the court.

Vaughn being an execution creditor of Silas Reed, garnisheed the Bank of the State of Missouri, returnable to the September Term, 1843, of the Court of Common Pleas for St. Louis county. On the 11th day of December, 1843, allegations and interrogatories were filed against the Bank, which were responded to by the Bank on the 3rd of February, 1844. The plaintiff then prayed judgment upon part of the answer and traversed the remainder. Afterwards, on motion, the court discharged the Bank from that part of the answer upon which judgment had been prayed, when the Bank filed an amended answer by F. Kennett, her President, stating in substance, that at the time the Bank was summoned as garnishee, there was in the Bank the sum of \$1,644 72, which had been placed there by the government of the United States, to the credit of "Silas Reed, Surveyor General," which money belonged to the United States, and not to said Reed, and which could only be drawn by said Reed as an officer of the United States and in his official capacity, and not as an individual: that at said time there was no money or effects in said Bank belonging to said Reed. To this part of the amended answer the plaintiff filed a traverse and took issue. The cause was submitted to the court sitting as a jury, when the court found the issue for the Bank, and rendered a judgment accordingly.

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The plaintiff then filed a motion for a new trial, for the reasons, that the finding was against the evidence; and that it was against the law under the evidence. The court overruled the motion, to which the plaintiff excepted, and now brings the case here by writ of error.

The bill of exceptions sets out the evidence of Henry L. Clark as follows: "At the time said Bank was garnisheed, in this cause, there were no funds in said Bank belonging to said Reed, or subject to the order of Silas Reed, in his individual capacity; but as Surveyor General there was to the amount of sixteen hundred and forty-four dollars and seventy-two cents: that the account said Bank kept with Silas Reed at said time, was in the style of "Silas Reed, Surveyor General," and upon that account there was to his credit the sum aforesaid. This fund came to the Bank by government warrants, drawn on the said Bank, payable to the order of Silas Reed, Surveyor General, and placed in said Bank by said Reed, or his clerk, endorsed in blank by said Reed, Surveyor General. Witness was teller of said Bank, and would not have paid said Reed's checks out of said fund, unless signed "Silas Reed, Surveyor General," which was the signature and style used by said Reed in drawing his checks. A distinction was made by the Bank between official and private deposits. This sum was considered to be the money of the government, and so treated by the Bank. He had no doubt but that said funds belonged to the United States. Silas Reed kept two accounts with the said Bank, one as Silas Reed, the other as Silas Reed, Surveyor General. That Reed's private funds could only be drawn upon his private check, and the funds to his credit as Surveyor General, could only be drawn on his official check. The private account of Silas Reed was opened subsequent to the date the Bank was garnisheed." This was all the evidence. No instructions were asked of the court on either part.

This case falls within the principles settled by this court, in the case of McEvoy, to use of Nelson vs. Lane & McCabe, 9 Mo. Rep. 48; and Von Phul vs. City of St. Louis, ib. 49, where the court said, that "the decision of the circuit court, sitting as a jury, will not be set aside unless the record show that the circuit court was called on to decide some question of law, and that its decision was wrong."

Judgment affirmed.

 William O. Marvin vs. Samuel W. Hawley and others.

WILLIAM O. MARVIN vs. SAMUEL W. HAWLEY AND OTHERS.

A sheriff who has collected money on an execution, is not a *debtor* of the plaintiff in the execution before the return day of the execution. In such a case, the sheriff cannot be garnisheed as a debtor of the plaintiff in the execution; nor can the money so collected by him be attached.

ERROR to St. Louis Circuit Court.

DRAKE, for Plaintiff.

POINTS AND AUTHORITIES.

1. There was no attachment of the specific money collected by the sheriff, the same not having been seized by the attaching officer and kept in his custody. Rev. Laws of 1835, § 6, p. 77.

2. The money could not be attached in the sheriff's hands, because,

First. The money collected by the sheriff is not the property of Marvin, until paid over to him. Dubois vs. Dubois; Turner vs. Fendall; Dawson vs. Holcomb; Thompson vs. Brown; Reddick vs. Smith; Wilder vs. Bailey; Pollard vs. Ross; Zurcher vs. Magee.

Second. Money collected by a sheriff on execution is "*in custodia legis*," and therefore not attachable. Dawson vs. Holcomb; Thompson vs. Brown; Staples vs. Staples; Reddick vs. Smith; Wilder vs. Bailey; Zurcher vs. Magee.

Third. The sheriff is commanded by the execution to have the money in court, on the return day of the writ, to be paid over to the plaintiff, and no process of this kind shall be allowed to interfere with the performance of this duty. Dawson vs. Holcomb; Zurcher vs. Magee; Turner vs. Fendall.

Fourth. Judgments of courts of justice should be *effectual*, which they frequently cannot be, if money levied in pursuance of them can be attached. Alston vs. Clay.

Fifth. The execution is *finis et fructus* of legal proceedings, and an attachment shall not be permitted to defeat its office, by preventing the payment of money collected under it. Wilder vs. Bailey.

Sixth. To allow the course of legal process to be interfered with in such a manner, must of necessity protract litigation, and produce continual conflict of jurisdiction. Reddick vs. Smith; Ross vs. Clark, 1 Com. Dig., title Attachment, D.; 2 Bac. Ab., title Customs of London, H.; Turner vs. Fendall, 1 Cranch 117; First vs. Miller, 4 Bibb,

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311; Ross vs. Clarke, 1st Dallas, 354; Dubois vs. Dubois, 6 Cowen, 494; Crane vs. Freese, 1st Harrison, (N. J.) 305; Conant vs. Bicknell, 1st Chipman, (Vt.) 50; Allston vs. Clay, 2 Haywood, (N. C.) 171; Dawson vs. Holcombe, 1st Ohio, 95; Reddick vs. Smith, 3 Scammon, 451; Thompson vs. Brown, 17 Pickering, 462.

3. A sheriff cannot be summoned as garnishee in respect of money collected by him on execution.

All the reasons advanced in support of the second point apply equally to this. The following additional reasons are urged:

First. In order to charge a garnishee, it is necessary either that the defendant have a cause of action against him—that is, that the garnishee should be his debtor—or that the garnishee should have in possession personal property of the defendant. When Milburn was summoned as garnishee, we have seen that he had no property or effects of Marvin in his possession, and it is certain that Marvin had no cause of action against him. *Maine F. & M. Ins. Co. vs. Weeks; Wilder vs. Bailey; Pollard vs. Ross.*

Second. Money collected by an officer on execution is not a "credit" in the hands of officer. Credit is the correlative of *debt*; so that the existence of a debt on the one part, is necessary to constitute a credit on the other. If there be no debt, there is no credit. The officer collecting money on execution, is in no sense whatever a debtor of the plaintiff in execution. *Wilder vs. Bailey; Lupton vs. Cutter.*

Third. An officer, deriving his authority from the law, and obliged to execute it according to the rules of law, cannot be holden by process of this kind; because the law will not tolerate such interference in the discharge of his duties. *Wilder vs. Bailey, 3 Mass. 289; Pollard vs. Ross, 5 Mass. 319; Chealey vs. Brewer, 7 Mass. 259; Maine F. & M. Ins. Co. vs. Weeks, 7 Mass. 438; Brooks vs. Cook, 8 Mass. 246; Lupton vs. Cutter, 8 Pickering, 303; Staples vs. Staples, 4 Greenleaf, 532; Adams vs. Barrett, 2 New Hampshire, 374; Zurcher vs. Magee, 2 Alabama, (New Series) 253; Pawley vs. Gaines, 1 Tennessee, 208; Overton vs. Hill, 1st Murphy, (N. C.) 47.*

In order to exhibit the applicability of the decisions quoted, the language of the attachment laws of as many of the States as could be obtained is subjoined, so far as to designate what in each State was subject to attachment.

MAINE & MASSACHUSETTS.—"Goods, effects and credits, in whose hands or possession soever they may be found."

NEW HAMPSHIRE.—"Whoever shall have in his possession any money,

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goods, chattels, rights, or credits, of any debtor, shall be deemed and taken to be trustee of such debtor."

VERMONT.—"Any creditor may cause such person, or persons, having such money, goods, chattels, rights, or credits, to be summoned as trustee, or trustees, of such absconding or concealed debtor."

NEW JERSEY.—"The rights and credits, moneys and effects, goods and chattels, lands and tenements of such debtor, wheresoever the same may be found."

NORTH CAROLINA, TENNESSEE AND ALABAMA.—"The estate of the debtor, wherever the same may be found, in the hands of any person, or persons, indebted to, or having any of the effects of the defendant."

OHIO.—"Lands, tenements, goods, chattels, rights, credits, moneys and effects, wheresoever they may be found."

ILLINOIS.—"Lands, tenements, goods and chattels, rights and credits, moneys and effects, of what nature soever, in whosoever hands or possession the same may be found."

LESLIE & LORD, for Defendants.

POINTS AND AUTHORITIES.

1. Under the attachment law of this State, an attachment can be served upon the credits of the defendant in attachment, in the hands of the sheriff; he having collected the money for the defendant, it is a credit in his hands, and he thereby becomes the debtor of the defendant, and may be summoned as a garnishee. Sec. 6, R. S. 1835, p. 77.

Amongst the earliest decisions touching this subject, will be found those of Massachusetts. It is now nearly thirty years since the Supreme Court of that State, in the case of *Wilder vs. Bailey & Dorling*, 3 Mass. 289, decided that a sheriff could not be held as the trustee of the judgment creditor. This case was regarded as having settled the construction of the Statute under which it was made, and has been followed by all the subsequent decisions upon the same subject in that State. By a careful examination of the Statute, it will be seen that it was intended to give a remedy to creditors against a particular class of debtors; that is, against such debtors as had fraudulently entrusted and deposited their "goods, effects and credits," in the hands of others, to prevent their being attached by the ordinary process of law. Justice Sedgwick, in his opinion in this case, after reciting the title, preamble and body of the act, in effect says:

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"That unless the goods, effects and credits of the debtor, are deposited and entrusted, *by the debtor himself*, in the hands of the person sought to be held as trustees, they will not be attachable."

Chief Justice Parsons, in the same case, says:

"The statute speaks of goods, effects and credits, entrusted to and deposited with others, so that they cannot be attached by the ordinary process of law, a language implying an *agency or privity of the debtor*, to place his property beyond the reach of ordinary attachment."

And again in the case of Chealy et. al. vs. Brewer and Seaver 7 Mass. R. 259, it is said:

"That the remedy intended by the statute was to enable creditors to obtain satisfaction of their debts, out of the goods, effects and credits of their debtors, "*entrusted and deposited*" in other hands, so that they could not be attached by the ordinary process of law."

And after referring to the particular provisions of the act, Sedgwick, J., says:

"From hence it clearly appears, that the goods attachable by this process must have been previously *entrusted to and deposited* in the hands of the trustee *by the debtor*."

The remedy then sought by the Mass. Statute, was to enable creditors to reach "goods, effects and credits," "*entrusted and deposited*" with others, by the agency or privity of the debtor, out of the reach of the ordinary process of attachment; and inasmuch as money collected by the sheriff for the debtor could not be said to be "*entrusted or deposited*" with him by the debtor, the court very properly decided that he could not be held as a trustee. It was not the case provided for by law, and this, we apprehend, was the real reason for the decision in that State. It must also be borne in mind that an attachment against the property of debtors in Massachusetts, issues in the first instance, attaching the property of the defendant, and holding it to satisfy any judgment which the plaintiff may recover. Howe's Massachusetts Practice, 155.

The remedy intended to be given by the 1st sub. of sec. 1 of the law concerning attachments, R. S. 1835, was to make the property and credits within this State, of a debtor whose residence was elsewhere, liable to attachment. The remedy sought by the statute of Massachusetts, and that sought by the statute of this State, is not the same. Decisions, therefore, under the Massachusetts statutes, can be no guide in settling a question arising under the peculiar phraseology of our own. Nor do the cases in the United States Courts touch this case. In the case of Turner vs. Fendall, 1st Cranch, 117, it was decided: "that

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money collected by an officer is not, while in his hands, the property of the creditor; that is, the creditor has no property in the specific pieces of money collected, and therefore the money cannot be levied upon as the property of the plaintiff in the execution;" and there is probably no case either in the State or Federal Courts that goes beyond this. In Massachusetts, as well as in some of the other States, the Judges have said that the sheriff was not the debtor of the plaintiff, and in most of the cases, it will be found that the judges have gone out of the way to say so; for there is not a case in which this decision has been put upon that ground alone. But is it true that the sheriff who has collected money, is not the debtor of the plaintiff in the execution? or that money in his hands is not a credit in favor of the party for whom it was collected? When the execution is satisfied, the judgment is discharged, and the defendant is no longer the debtor of the plaintiff; and so far have the courts carried this doctrine, that when money enough is paid to satisfy the execution, or property sufficient to satisfy the execution is levied upon, it operates, *per se*, as an extinguishment of the judgment. Ex parte Laurence, 4 Cowen, N. Y. R. 417; 8 Cowen, 192; Clark vs. Withers, 2 Ld. Raymond, 1072; Todd vs. Blunt, 4 Mass. R. 402. See also 12th Johnson, 207, and 7 Johnson, 428-9.

To whom then does the money belong, when it gets into the hands of the sheriff? To the plaintiff in the execution, and it is a credit in the sheriff's hands, which by the very words of our statute is attachable. It is true the plaintiff in the execution cannot commence a suit against the sheriff until the return day, not because the money does not belong to him, but because the sheriff was not bound by law to have it before that time; and the right of action does not accrue until after the return day and demand made; but this makes it no less a credit. It might as well be said that a note in the hands of a third person, was not such a credit as might be attached, because it had not matured.

In Conant vs. Bicknell, 1st Chipman's Vt. Rep. p. 50, the court say :

"On the receipt of money collected by an officer on execution, the officer becomes the debtor to the plaintiff for the same."

And the same doctrine is recognized in Crane vs. Freese, 1st Harrison, N. J. Rep. 305.

In New Hampshire it has been decided, and that too upon a review of all the decisions previously made in that State as well as others, "that a sheriff may be charged as a trustee of one for whom he has collected money upon an execution, although the money has never been demanded of him, and although the execution be not returned, or returnable." Woodbridge et al. vs. Morse, 5 N. H. Rep. 519.

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In New Jersey, in a recent case, it was held :

"That an attachment was well levied upon the credits of the defendant in attachment in the hands of the sheriff; the sheriff having received the money for the defendant in attachment, it was a credit in his hands to that amount." *Crane vs. Freese*, 1st Harrison, N. J. R. 305.

McBRIDE, J., delivered the opinion of the court.

This was a motion made against the sheriff of St. Louis county, to pay over to the plaintiff the amount of an execution in said sheriff's hands, in favor of the plaintiff, and against the defendants. The circuit court overruled the motion, when the plaintiff having taken his bill of exceptions, has brought the case here by writ of error.

The bill of exceptions shows that an execution in favor of the plaintiff, and against the defendants, was placed in the hands of the sheriff of St. Louis county, returnable to the April term, 1845, of the St. Louis circuit court, at which term it was returned by the sheriff, "satisfied." Upon the return day, and after the return of the execution, the attorney of record of the plaintiff, demanded of the sheriff payment of the money collected, which was refused; whereupon the plaintiff moved the court for an order on the sheriff to pay it over, or show cause why he did not pay it. The sheriff resisted the motion, on the ground that under several attachments, (setting them out by their title) issued by the clerk of the circuit court, the clerk of the court of common pleas, and a justice of the peace of said county, against the plaintiff Marvin; the money had been attached in his hands, and he summoned as garnishee, to answer interrogatories, &c. That he retains the money in his hands only for his own safety, until such time as it shall be determined whether he is liable as garnishee in said attachment suits.

This court is called upon to decide, whether money in the hands of the sheriff, collected on execution, can be attached by a creditor of the plaintiff in the execution, before the return day of the writ.

Marvin not being a resident of this State, the proceeding by attachment was instituted against him, under the first section of the first article of an act, entitled "an act to provide for the recovery of debts by attachment." Approved March 20, 1835, R. C. 76.

By the sixth section of the same article, among other provisions, is the following: "When goods and chattels, money, or evidences of debt, are to be attached, the officer shall seize the same and keep them in his custody, if accessible, and if not accessible, he shall declare to the person in possession thereof, that he attaches the same in his hands, and summon such person as garnishee. When the credits of the defendant

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are to be attached, the officer shall declare to the debtor of the defendant, that he attaches in his hands all debts due from him to the defendant, or so much thereof as shall be sufficient to satisfy the debt, interest and costs, and summon such debtor as a garnishee."

This latter clause of the act evidently contemplates the existence of the relation of debtor and creditor, between the person garnisheed and the defendant in the attachment. It is the language of the statute itself, and the statute being in derogation of the common law, must be strictly construed. The question then arises, is a sheriff who receives money on an execution by virtue of his official character, the debtor of the plaintiff in the execution?

On this point there is some conflict of authority; the courts of Vermont and New Jersey, and perhaps some other of the State courts, having held that on the receipt of money collected by an officer on execution, the officer becomes the debtor to the plaintiff for the same. 1st Chipman, 50; 1 Harrison, N. J. 305. Whilst it has been decided in Massachusetts, 3 Mass. 289, and by the Supreme Court of the United States, 1st Cranch, 117, that the relation of debtor and creditor does not exist, and that not only has the execution creditor no right of action against the sheriff for money collected on execution before the return day of the execution, but that in strictness of law the sheriff might be held liable for a voluntary payment to the plaintiff before that day.

Money thus in the hands of an officer cannot be considered as a credit; for there cannot be a credit without a creditor and a debtor. The court say that "there is nothing in the reason of the thing resulting from the relation of a judgment creditor, and an officer who has collected money for him, which renders the one a debtor and the other a creditor. There is nothing said in any of the books, which implies that that relation exists between them. On the contrary, money so collected, is in the custody of the law, and the sheriff is the trustee for its safe keeping. Money then, I think, under such circumstances, is not the *goods, effects and credits*, of the judgment creditor in the sense of the act." Upon legal principles, we think the latter decisions are correct.

The reason of the above rule, upon principles of general policy, is still less questionable. If the practice of garnisheeing the sheriff for money in his hands, received on execution, were tolerated, it would not only greatly interrupt the due and speedy administration of the law, and prevent the courts from consummating their judgments, but it would involve the ministerial officers of the court in interminable difficulties and delay in the discharge of their duties.

The writ commands the sheriff to make the money, and have it in

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court on the return day thereof. On that day the plaintiff's attorney and witnesses, with the officers of the court who have rendered services, some perhaps under compulsory process, attend to receive their fees; when the sheriff, instead of producing the money, that those who are thus entitled (and some of whom have liens created by law) may be paid their respective demands, certifies to the court that the money has been taken out of his hands by an attachment issued from the office of another court, or from the office of a justice of the peace in the county. If the return will excuse the officer, and it must have that effect, if the proceeding by attachment against him be permitted, then those having liens, and those who have been compelled by law to render services in the cause, are defeated in their just claims, and the court divested of its equitable power to dispose of the money, made by virtue of its own writ, amongst those entitled thereto. If the sheriff be amenable to such a proceeding, it will necessarily impose upon him the burden and costs of attending all the courts in the country, and answering the interrogatories filed against him. He will not only be compelled to do that, but he will have to decide at his peril upon the rights of all those who have an interest, in law or equity, to the money in his hands. He will furthermore be compelled to incur the responsibility of retaining the money in his hands, until the final determination of the suit by attachment.

It is not the policy of the law thus to embarrass the regular proceedings of the courts, deprive parties of their rights, and impose such onerous and difficult duties on the sheriff. We are then of opinion that money in the hands of the sheriff, collected on execution, cannot be attached by a creditor of the execution plaintiff before the return day of the writ.

Judgment reversed and cause remanded.

STATE OF MISSOURI vs. JACOB HAWTHORN.

1. The act of 26th February, 1835, supplementary to the act of 9th February, 1833, entitled, "An Act to authorize a sum of money to be raised by lottery, to be given to the Sisters of Charity, in the city of St. Louis, for the use of the Hospital over which they now, or may hereafter have the control or management," authorizes the commissioners to sell the lottery; and after a sale, the legislature can pass no law impairing the obligation of the contract of sale.
2. The commissioners having sold the lottery, the act of 19th Dec. 1842, prohibiting the sale of lottery tickets in this State, is unconstitutional as to the vendee—and his right to sell under the purchase made in accordance with the act of 26th February, 1835, is not affected by that act.

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ERROR to St. Louis Criminal Court.

STRINGFELLOW, Attorney General for the State.

The State relies on the following points and authorities, to reverse the decision of the criminal court :

1st. It was in the power of the legislature to repeal the act granting to the managers the power to raise money by lottery, so long as that power remained in their hands. See *Freleigh vs. the State*, 8 Mo. Rep. 606 ; *State of Delaware vs. Phalen & Paine*, 3 Harrington, R. 452.

2. The amendatory act did not create any contract, or authorize the commissioners to make any contract of a character different in its obligations from that authorized by the act establishing the lottery.

The latter authorized the appointment of a manager, with power to sell tickets, and draw the lottery *in this State*. The former to draw the lottery in any part of the United States. If the manager in the one case could not be deprived of his rights, neither could he in the other.

3d. The defendant, Hawthorn, can only be regarded as the agent of the managers ; they had no right to *sell* the lottery, but only to appoint managers to *draw* the lottery. So long as they had not or could not sell their powers, they could be taken away by the legislature. *State of Delaware vs. Phalen and Paine*, above referred to ; Statutes of Delaware, 1827, p. 131, entitled, "An act authorizing a lottery," &c.

GEYER, Attorney for Defendant in error.

In support of the judgment of the criminal court, the defendant in error submits the following propositions :

1. The act of the 9th February, 1833, is a contract which could not be impaired by the act of a subsequent legislature. It is a grant to the commissioners, a *quasi corporation*, in trust for the use of the Sisters of Charity. It is not a mere naked power, revocable at pleasure, but it is at least a power coupled with an interest, and as such irrevocable.

2. The act of February, 1835, was the creation of a new power—a power to make contracts, which power being executed, by the making a contract authorized by it—that contract is obligatory upon the State, and the commissioners as well as the other contracting party—and could not be constitutionally altered or impaired.

3. The clause in the contract, which declares that Gregory shall not be bound, after any interference of a competent power to prevent its

execution, can make no difference. It confers no power on the legislature to annul it—and the question of power must depend on the authority of the legislature, aside of the contract; besides, the exemption depends upon the competency of the interfering power, and not upon the mere exertion of an assumed power, without regard to its constitutionality.

4. The act of assembly under which the defendant was indicted, passed 19th December, 1842, must either be construed not to include lotteries to be drawn under contracts authorized by the State, or if construed to include these, it is unconstitutional and void as to the lottery for the benefit of the St. Louis Hospital—drawn or to be drawn in pursuance of the previous acts of assembly—and the contracts made in conformity thereto. *State of Delaware vs. Phalen & Paine*, 3 Harrington R. 452.

NAPTON, J. delivered the opinion of the court.

The defendant Hawthorn, was indicted by the grand jury of St. Louis county, for selling lottery tickets, in the lottery for the benefit of the St. Louis Hospital. Upon a plea of not guilty, and a trial had thereon, the jury found a special verdict, upon which the judgment of the court was for the defendant.

The facts found by the special verdict were as follows: On the 9th February, 1833, the legislature passed an act, entitled, "An act to authorize a sum of money to be raised by lottery, to be given to the Sisters of Charity, in the city of St. Louis, for the use of the Hospital, over which they now, or may hereafter have the control and management."

The first section of this act, appointed certain persons named therein as commissioners, and authorized them by a lottery or lotteries, to raise the sum of ten thousand dollars, to be paid to the sisters of Charity, for the use of the Hospital. By the second section, the commissioners were authorized to appoint a manager, to sell the tickets and draw the lottery in any part of this State, provided the scheme or schemes were first approved by the commissioners. The third section required the manager to execute his bond to the county court, with security as the commissioners might require, in the sum of fifteen thousand dollars, conditioned, that he would pay all prizes, payment of which should be demanded, within twelve months after the drawing, and pay over to the commissioners, all sums in his hands, after the payment of prizes, commissions and other necessary expenses. The tickets were required to

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be signed by the manager, and countersigned by one of the commissioners.

On the 26th February, 1835, a supplementary act was passed. By this act the third and fourth sections and the proviso to the second section of the former act were repealed, and the commissioners were authorized "to contract with any person to have said lottery drawn in any part of the United States, on such terms as they shall consider most advantageous," and they were allowed "the same privileges as to the sale of tickets in this State as heretofore, until the amount authorized in said act be raised." The commissioners were also required to take bond and security of the person with whom they contracted, conditioned for the payment of the money, and the faithful performance of the contract.

On the 28th December, 1835, an agreement was made between the commissioners on the one part, and Dudley S. Gregory, on the other part, signed and sealed by all the parties thereto. This agreement after reciting the acts of the legislature above referred to, and that the commissioners had agreed to dispose of said right of drawing schemes of a lottery or lotteries, for the purpose of raising the sum of money authorized by the act, proceeds to state, that the commissioners in consideration of two and a half per cent. of the sales of tickets in this State, agreed to sell, dispose, assign, transfer and set over to, and appoint the said Dudley S. Gregory, sole manager and conductor of said lottery, and transfer to him the sole and exclusive right to draw such scheme or schemes, with the privilege as to the sale of tickets, without the payment of any tax, by virtue of the two acts above recited. The commissioners further transfer to said Gregory, the right to decide the fate of the tickets, by the numbers which may be drawn in any designated class of lotteries, authorized by the laws of Virginia, and under the management of said Gregory. The said Gregory agreed to assume the entire management of the lottery, to pay the two and a half per cent. upon the amount of sales made in this State, to pay all expenses, costs and charges, attending the management of said lottery, and sustain all risks and losses, and pay all prizes drawn, after deducting fifteen per cent. The said Dudley was to give bond and security, in the penalty of thirty thousand dollars, for the performance of every duty required by this contract. The said Gregory also reserved to himself the privilege of abandoning the contract, upon giving sixty days notice, and paying the money due up to the time of abandonment, and was not to be bound by this agreement, in the event of such interference by the legislature, judiciary, or other competent power,

so that the lottery business could not be conducted, in which case payment was to be made only up to the time of such interference. The right of assigning his contract to any other person was also stipulated for.

On the 23d August, 1841, Dudley S. Gregory, assigned this contract to Walter Gregory, which transfer was, on the 5th October, 1841, approved by the commissioners. On the same day Walter Gregory gave bond and security for the performance of the contract, as required by the act. On the 12th May, 1842, Walter Gregory appointed the defendant, Hawthorn, his agent for selling tickets in Missouri. The jury found that the ticket sold by said Hawthorn, was a ticket in a class of the lottery authorised by the above recited act of assembly, and that there had not been raised by the sale of tickets the sum of ten thousand dollars.

The court entered a judgment for the defendant on this verdict, and the State brings the case here by writ of error.

On the 19th December, 1842, the legislature passed an act, repealing all laws authorizing the drawing of any lottery, or the sale of any tickets within this State, and imposed heavy penalties upon any one breaking its provisions. The only question arising in this case is whether this last mentioned act, so far as it affects the present defendant, is contrary to that clause of the constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

Our opinion in relation to the act of February 9th, 1833, was intimated in the case of Freleigh vs. the State, and the opinion is still entertained that laws of this character, do not create any contract. Neither the commissioners appointed under the act, or the Sisters of Charity, for whose benefit the money was to be raised, acquired any interest which subsequent legislation could not take away. That act did not create any contract between the State and the commissioners, or between the State and the *cestuys que trust*, which could not be modified or repealed at the pleasure of the legislature. The money proposed to be raised was a mere gratuity, without consideration, and the commissioners being merely the agents of the legislature, the law imposed no obligation upon a succeeding legislature, to continue their authority, or permit the drawing of the lottery, and the sale of the tickets.

The act of Feb. 26th, 1835, presents a different aspect. By that act, the commissioners were authorized "to contract with any person to have said lottery drawn in any part of the United States, on such terms as

they shall consider most advantageous." We have no difficulty in saying that a contract made in pursuance of this act, is as much obligatory upon the State as upon the other contracting party, and the legislature could pass no law impairing its obligation.

Two questions then arise—first, was the contract between Gregory and the commissioners authorized by the act; and second, if so, does the act of 1842, impair its obligation.

Had the commissioners under the act of 1835, sold the lottery privilege, for a specified term of years, in consideration of the sum of ten thousand dollars paid upon the execution of the contract, a question might have been raised, whether such a contract would have been within the scope of their authority. Had such a contract been made and warranted by the law, it could scarcely be doubted that the legislature could not have deprived the purchasers of the benefit of their bargain. In such a case the only question would have been, whether it would be a fair interpretation of this law, to allow the commissioners to go into the market and set up their lottery franchise to the best bidder, thereby restricting the action of the legislature for a term of years, limited only by the circumstances, which might affect the value of such property in the estimation of those who dealt in it. The objection however, if tenable at all, certainly does not lie to the contract made with Gregory. The privilege of selling tickets was not granted for an arbitrary period, but was limited by the happening of the event, which the act itself had fixed as the period of its termination. The right to sell the tickets was transferred to Gregory, until that portion of the proceeds of their sale, which belonged to the Hospital, should amount to the sum authorized to be raised by the act. So far therefore as the character of the contract is concerned, it seems to have been framed with a special regard to the provisions of the act.

It has been suggested in the argument on behalf of the State, that the act of 1835, did not design to affect any change in the law of 1833, except to authorize the manager appointed by the commissioners in the first named act, to draw the lottery, and sell the tickets *without* the limits of this State. The privilege of drawing the lottery in other States, upon schemes connected with other lotteries, was, no doubt, intended to be conferred, but it does not therefore follow, that this was the only power that was actually given to the commissioners. So far as the sale of tickets beyond the limits of the State is concerned, that was a matter about which the legislature of this State could take no action, or if they did, their action could give no rights. The language

of the act is exceedingly broad; the commissioners are authorized "to contract for the drawing of the lottery, on such terms as they might consider the most advantageous." What is there in this language to limit the discretion of the commissioners, or to prevent them from selling the privilege, either for cash in hand, or payable by instalments, or for a certain portion of the profits?

Believing that the contract with Gregory was fully warranted by the letter, as well as spirit of the act, under which it was made, we proceed to inquire whether the subsequent act of 1845, was a violation of that contract.

It has been argued that Gregory, by his contract with the commissioners, became thereby a mere sub-agent of the State, and as such could exercise no powers, or acquire any interests, which were not conferred upon the manager appointed by the commissioners under the act of 1833. If this construction of the contract be warranted, the whole subject remained in the power of the legislature, upon the principles heretofore assumed. But an examination of this contract will, we apprehend, show a material difference between the cases. Under the act of 1833, the manager appointed by the commissioners received a fixed salary, we suppose proportioned to the value of his services; the entire expense, responsibility and risk, if there were any, rested on the commissioners. He was a mere agent of the commissioners, subject to their control, and therefore indirectly the agent of the State. Gregory, on the other hand, agrees to pay a definite per centage upon the sale of tickets, and assumes upon himself the entire expense of managing the lottery, takes upon himself all the risks, and makes himself responsible for the payment of all prizes. Under the act of 1833, the manager took upon himself no risk whatever, and was a mere agent, with or without a compensation. If he received a compensation, as we may assume that he did, that compensation ceased by the will of the legislature, whose agent he was, and from whom he derived his authority; he was in no worse condition than any officer of the State, whose fees may be reduced or entirely taken away, at the pleasure of the legislature. Not so with the contractors under the act of 1835. The privilege of selling tickets within this State, until a certain sum of money is raised, is sold to them. The value of this privilege may depend very much on its duration. The first drawings may be very unprofitable, and yet the per cent. upon the sale of tickets, which belongs to the Hospital, remains the same. Although bound to pay this per cent. only upon the tickets actually sold, the willingness of this contractor to give this rate of profit, may have been owing to calculations upon the sale of all the

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tickets authorized to be sold. Had the commissioners been authorized to raise only five, instead of ten thousand dollars, would the purchasers of such a privilege have been willing to give as large a per cent. upon the sale of tickets in the one case as in the other? This it is manifest must depend upon the expense necessary to be encountered in conducting such operations, a matter about which there is no evidence, and concerning which we are left to mere conjecture. The validity of the law cannot depend upon the value of the contract, and though we may infer from the peculiar character of this contract, that the interference of the legislature with it before its completion, would not occasion any pecuniary loss to Gregory or his assignee, that circumstance does not affect the right of the defendant to insist upon his entire contract.

It is observed that Gregory reserved to himself the right of abandoning this contract on sixty days notice, or upon an interference by the legislature or judiciary. Had the State or the commissioners reserved a similar privilege, the question now presented would not have arisen. This only shows that the commissioners were willing to extend a privilege to the contractor, which they did not think proper to reserve to themselves. The right of the legislature to rescind the bargain, is not anywhere recognized by either party, but the actual interference with its execution on the part of the State is merely recognized as an occurrence which may authorize the vendee to abandon his bargain. This, however, is left to his option. He has not thought proper to take this course, but insists upon his right under the contract.

We are aware that it is at all times a delicate task, for a court to question the validity of a legislative enactment. It is certainly an unpleasant one where the court feels every disposition to sustain the act whose obvious tendency is to suppress an evil and promote public and private morals. These considerations, however, cannot be permitted to discharge us from the performance of a duty imposed by the constitution, and especially where reason and justice unite with the constitutional prohibition, in teaching that a legislature can no more violate a contract made by themselves, or under their authority than they can rescind or alter, or impair the obligation of one made between private individuals.

Judge McBride concurring, the judgment is affirmed.

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VAN ARSDALE & WARNOCK vs. JOHN M. KRUM, JUDGE, &c.

Van Arsdale & Warnock filed their petition for a mandamus to compel the Judge of the St. Circuit Court to quash certain attachments. The petition stated that Richards et al, as also some five other plaintiffs had instituted suits by attachment against the property of one Berlin. That subsequent to the levy of these attachments the petitioners had also instituted suit by attachment, and had the same property attached—that the bonds of the earlier attachments were all void—that petitioners had moved to quash the attachments, and their motions been overruled, and that the property was not sufficient to satisfy all the claims—and prayed that the Judge be compelled to quash the earlier attachment because of the defects in the bonds.

Held:

1. That under the act of 13th Feb., 1839 concerning attachments, the court may on motion of the plaintiff, give leave to amend an insufficient bond—it matters not what be the defect.
2. That a plaintiff in one suit by attachment has no right to resist another attachment against the same property.

Qr. Is a mandamus a proper remedy in such a case?

Petition for Mandamus.

GOODE & CORNICK, for Petitioners.

POINTS AND AUTHORITIES.

1st. The attachment bond of Richards, Bassett & Aborn, was substantially defective. See Session acts of 1837, p. 8, § 1. Session acts of 1839, p. 7, § 3, and p. 8, § 19.

2d. It is such a defect as cannot be amended. See Mantz vs. Hendley, 2 Hen. & Munn, 308; McDaniel vs. Sappington, Hardin's R. 94; Stephenson vs. Robbins, 5th Mo. R. 21; Caldwell vs. McCree, 8th Mo. R. 335; Bridgeport vs. Steamboat Elk, 6th Mo. R. 356; Graham vs. Bradley, 7th Mo. Rep. 282; Session acts of 1839, p. 7, sections 13, 14 and 15.

3rd. It is a defect which the petitioners can take advantage of. See Mantz vs. Hendley, 2 Hen. & Munn, 314; Alexander vs. Hayden, 2 Mo. R. 187; Fairbanks vs. Stanley, 18 Maine Rep. 299; Berry vs. Spear, 1 Shepley 187; Buckman vs. Buckman, 4 New Hamp. Rep. 319; Clark vs. Roberts, Breese Rep. 222; Lea vs. Vail, 2 Scammon R. 473.

McBRIDE, J., delivered the opinion of the court.

Van Arsdale & Warnock filed their petition in this court praying for

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a mandamus upon John M. Krum, who is judge of the circuit court for St. Louis county.

The petition sets out, that on the 27th January, 1845, an attachment was issued from the office of the clerk of the circuit court of St. Louis county, in favor of Richards, Bassett & Aborn, against John Berlin; that prior to the 31st January, 1845, five other writs of attachment were issued from the same office, in favor of other creditors, against Berlin, and that on the said 31st January, the petitioners sued out their writ of attachment. The attachments were all levied by the sheriff of St. Louis county on the same property of the defendant, which being perishable, was sold under an order of the court; that the bonds executed by the plaintiffs, in five of the cases, are defective, not being conditioned as the law prescribes; that the other attachments having been issued prior to theirs, and the proceeds of the sale not being sufficient to satisfy them, the petitioners are in danger of losing their demand, unless those attachments in which were filed defective bonds, be quashed.

That on the 10th May, 1845, the defendant, Berlin filed his motion in the circuit court to quash the attachment issued in favor of Richards, Bassett & Aborn against him, for the reason that the bond filed in the case is defective, thereupon the plaintiffs filed a cross-motion for leave to amend their bond. The court ordered that the plaintiff's file within ten days therefrom a good and sufficient bond, or otherwise the attachment would be quashed. The amended bond was filed on the 12th May, 1845. The defendant Berlin excepted to the action of the court in overruling his motion and in permitting an amended bond to be filed.

That at some period of the proceedings, not shewn by the record, but perhaps prior to the 1st July, 1845, the petitioners filed a motion to quash the attachments in the cases in which defective bonds had been filed, the suit of Richards, Bassett & Aborn being one of them; which motion was, on the 1st July, overruled by the court; they thereupon excepted and preserved the facts by a bill of exceptions, which they refer to, and make a part of their petition.

The following points are presented for the consideration of this court:

1st, The bond of Richards, Bassett & Aborn was substantially defective.

2d, It is such a defect as cannot be amended.

3d, The petitioners can take advantage of the defect.

The first two points will be considered together. The proceedings in the case of Richards, Bassett & Aborn, were had under the provi-

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sions of an act of the General Assembly of this State, entitled "an act to amend an act to provide for the recovery of debts by attachment," approved Feb. 13th, 1839; Sess. acts 1838-9, p. 6.

The first section provides that "any creditor who shall file an affidavit and bond, as hereinafter required, may sue his debtor by attachment in the following cases," &c.

The third section provides that "the bond to be given by the plaintiff shall be executed by him, or some responsible person for him, as principal, with one or more securities, resident householders, of the county in which the action is to be brought, in a sum of at least double the amount of the demand sworn to, payable to the State of Missouri, conditioned that the plaintiff shall prosecute his action without delay, and with effect, and shall pay all damages which may accrue to any defendant or garnishee, by reason of the attachment, or any process, or proceeding in the suit."

The concluding sentence of the first bond, filed by the plaintiffs, was as follows: "That if the said plaintiffs shall prosecute their said suit with effect, and without delay, and shall pay all damages which may accrue to the said defendant, or to any garnishee in said suit, in consequence of said attachment, then this obligation to be void, otherwise to remain in full force," omitting, as will be seen, after the word attachment, the words "or any process or proceeding in the suit."

The plaintiff, by his motion for leave to amend his bond, admitted its insufficiency; the question then arises, upon the power of the court, to permit the amendment asked for by the plaintiff.

By the 13th section of the act it is enacted that "if at any time pending a suit in which any property or effects shall have been attached, it shall appear to the court or justice before whom the action is pending, that the bond given by the plaintiff is insufficient, or that any security therein has died, or removed from the State, or has become, or is likely to become insolvent, the court or justice may order another bond, and such further security to be given, as shall seem necessary; five days previous notice being given to the plaintiff or his agent, or attorney, of the application for such order."

The foregoing section would appear to settle the question, as to the right of the court to permit the bond to be amended; but the petitioner's counsel contend, that amendments of the character permitted by the court, are not such as are contemplated by the above section; that the insufficiency must be for the reason either, that the security has died, removed from the State, or has become, or is likely to become insolvent. If such were the intention of the law makers, it would have

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been extremely easy and convenient for them so to have framed the section, omitting the words "*that the bond given by the plaintiff is insufficient.*" Finding those words, however, in the statute, and presuming that they were intended to mean something, it is the duty of the court to give them effect, when cases arise which render it necessary.

Those who have been familiar with the practice throughout the country under the statute, will readily understand the necessity of this construction, as a shield to protect the rights of debtors. A creditor who is irresponsible, files his affidavit, and a defective bond, upon which a writ of attachment issues, and is placed in the hands of an officer, who attaches the chattels of the debtor, which being perishable, an order is obtained, in vacation, from the judge, and a sale is made, perhaps and most probably, at a ruinous sacrifice, before the return day of the writ. At the return term, the defendant moves the court to require the plaintiff to file a good and sufficient bond, or that his attachment will be quashed; this and its attendant consequences, being the only penalty which the court can inflict on the plaintiff, for filing a defective bond; the order being made, and the bond amended, the proceeding is intended by the statute as a shield for the benefit of the debtor, whereby he may be enabled at a future day to sue on the bond, and recover damages for any illegal act of the creditor. We think the circuit court committed no error in permitting the plaintiffs to amend their bond, upon their own motion for that purpose.

We might here close the case, but another point has been pressed by the petitioner's attorney, which we will briefly notice. If the foregoing two points were adjudged adverse to the action of the circuit court, could the defect in the bond, and the leave given to amend, be taken advantage of by the petitioners in the manner here attempted?

The record does not show at what stage of the proceedings, the petitioners were made a third party; it only shows that two or three months after the disposition of the cross-motion of the plaintiffs, and the defendant in the action, the court overruled the motion of the petitioners to quash the attachment which was predicated on the same ground as the defendant's motion. The proceeding being a novel one, we have looked into the authorities upon which the counsel for the petitioners place their right, to see if any such right really exists or has ever been recognized by the courts. The only case which we have seen, which bears even a remote analogy to the one at bar, is to be found in 4 New Hampshire R. 319.

The facts of the case show that the plaintiff sued out his writ of attachment against the defendant, returnable to the September term,

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1826, and caused certain lands and chattels of the defendant to be attached by virtue of his writ. At the February term, 1828, certain other creditors of the defendant, who had subsequently caused the same lands and chattels to be attached, as the property of the defendant, suggested to the court that the suit was prosecuted with collusion between the parties, for the purpose of defrauding the creditors of the defendant, and that there was in fact nothing due from the defendant to the plaintiff. And thereupon, the creditors having given security to the plaintiff, to pay all such costs as the court should order on account of their interference in the suit, the court ordered that the plaintiff should make his election to dissolve his attachment, or consent to try the question, whether his suit and attachment were collusive, in an issue between him and the said creditors. The plaintiff elected the latter. An issue was formed for the purpose between the plaintiff and the creditors, and tried by a jury, who found that the suit was prosecuted collusively, for the purpose of defrauding creditors. The court then ordered all further proceedings to be stayed, from which order the plaintiff appealed. The superior court sustained the action of the court of common pleas, declaring that the creditors, upon giving bond, may be permitted to defend in the name of the defendant.

In running a parallel between this case in New Hampshire, and the one now before the court, it will be found that they differ materially in almost every respect. The proceeding in New Hampshire was based upon a charge of collusion between the attachment creditor, who had the prior lien, and the defendant, for the purpose of defrauding subsequent attaching creditors; and when the court granted permission for them to come in and defend, it was only on condition that they should give a sufficient bond to pay all costs that might be adjudged against the defendant in the attachment, and that their defence should be made in his name.

In this case there is no charge of collusion between the plaintiffs, Richards, Bassett & Aborn, and the defendant Berlin—there was no tender of a bond by the petitioners, to secure the costs which might grow out of any proceedings had at their instance—they come into court and claim the right to interfere in a case to which they are strangers, solely on the ground that if the plaintiffs are permitted to amend their bond, and obtain a judgment against the defendant, the whole of the defendant's property and effects will be applied to such judgment, and nothing left out of which they can make their debt. This does not afford a sufficient ground for the exercise of any extraordinary favor or indulgence by the court. The petitioners are precisely in the situation

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of all junior creditors of an insolvent, and have no extraordinary claims for favor. We conclude, therefore, that the circuit court committed no error in permitting the plaintiffs to amend their bond, but if the court had erred, the petitioners have no right officiously to interfere. The motion for a mandamus is overruled.

NAPTON, J. I am of opinion that this case is not one in which a writ of mandamus would be proper, to cure the errors (if any had been committed) of the circuit court.

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1. The "concealment" mentioned in the stat. of lim. of 1835, which prevents the running of the statute, need not be with a fraudulent intent—any concealment which prevents the plaintiff from bringing his suit is sufficient.
2. Where a party living in Illinois purchased goods, and had them shipped to his then residence, and then immediately moved to Clay county in this State—remained there a short time, and then moved to St. Louis county—but never informed the creditor of his place of residence—the creditor having used proper diligence to discover his residence, and not finding him—held to be such a concealment as to prevent the statute from running.

APPEAL from St. Louis Circuit Court.

GANNT, for Appellant.

POLK, for Appellees.

McBRIDE, J., delivered the opinion of the court.

Josiah Pope & Otis West brought their action of assumpsit against Daniel Harper. The declaration contains the common counts. The defendant after having obtained a bill of particulars, among others filed two pleas of the statute of limitations. The plaintiffs replied, first:—the cause of action did not accrue within two years; second: the defendant left the State, and did not return until within two years next before the commencement of this suit; and third: that defendant concealed himself, and so prevented the commencement of a suit against him. There was a third plea filed by defendant, interposing the statute of limitations, to the demand of the plaintiff. Rejoinders were filed, and the case went to trial before a jury, who found that the defendant

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did undertake, &c., and that he did conceal himself, and so prevent the commencement of a suit;—and that the cause of action did not accrue within two years, next before the commencement of the suit; and that the defendant came to the State of Missouri, more than two years before the commencement of the suit, and has ever since continued to reside therein—and they assessed the damages at \$317 84.

The defendant filed a motion for a new trial, assigning as reasons therefor: 1st, That the verdict was against evidence; 2d, Against the weight of evidence; 3d, Against the instructions of the court, given at the instance of the defendant; 4th, That the court erred in instructing the jury as prayed for by the plaintiff's attorney. The court overruled the motion and the defendant excepted, and appealed to this court.

The bill of exceptions shows that at the trial, the plaintiffs proved the partnership of Pope and West, and the sale and delivery of the goods to the defendant, by the plaintiffs, in September, 1837, and their value. That in the years 1837,—'8,—and '9, the plaintiffs employed an agent, who was in the habit of making excursions into the interior of Illinois and Missouri, for the purpose of collecting for different merchants in St. Louis, and he was told that he would find the defendant at Exeter, on the Illinois river. He visited the place indicated, enquired for defendant, and was informed that he had removed from that section of the country, and his informant could not inform him where the defendant had gone. He afterwards enquired for him without success on the Upper Mississippi, as high as Quincy, Illinois, and in 1838 and '9, he enquired for the defendant on the Missouri river, visiting most of the towns on the river, and some in the interior. He did not enquire in all the towns which he visited, as in some of them he had only about an hour's business. Witness then took a horse and travelled south to Arkansas, &c,

The defendant read in evidence the depositions of witnesses residing in Clay county, stating that in the fall of 1837, the defendant removed to that county and remained there till the spring of 1839, going once in the spring of 1838, to St. Louis, to purchase groceries. He then produced witnesses residing in St. Louis county, who proved that the defendant in the spring of the year 1839, moved to that county,—saw him seeking employment or work by the day—that he lived a short period at his mother-in-law's, and then removed to his own farm, about twelve miles from the city of St. Louis, where he has since resided. The circuit court at the instance of the defendant's counsel, gave several instructions, the first referring to the question of the return of

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the defendant into this State, more than two years, &c.; and the second and third, stating to the jury in substance, that the plaintiff is bound to take notice of the residence of his debtor, in any part of the State of Missouri, unless the defendant be guilty of concealment, &c., the burden of proving which, lies on the plaintiff, and in the absence of testimony tending to show such concealment, they must find the issue for the defendant;—and that the fact that the plaintiffs did not succeed in finding the defendant does not prevent the running of the statute, unless the jury believe that such finding or discovery of the defendant, was prevented by concealment, &c.

At the instance of the plaintiffs' attorney, the court instructed the jury:—1st, That the concealment contemplated by the statute, need not have been with the intent of defrauding the plaintiffs of their demand. 2d, There is a legal obligation on the debtor to pay the creditor the amount of the debt, so soon as the same falls due.

Two questions are presented for the determination of this court.

First, Did the court err in giving to the jury instructions asked by the plaintiffs? *Second*, Was the finding of the jury against the evidence in the cause? By the eighth section of an act of the general assembly of this State, entitled "An act prescribing the time of commencing actions," approved March 16th, 1835, R. C. 396, it is provided that "if any person by absconding or concealing himself or by any other improper act of his own, prevent the commencement of any action in this act specified, such action may be commenced within the times herein respectively limited, after the time the commencement of such action shall have ceased to be so prevented."

The counsel have not referred us to any legal exposition of the term "concealing," as used in the foregoing connection, nor have we been able after diligent research, to find any. It is a word not generally used in the statutory provisions of the several States, in connection with the subject now before us, and thus far appears not to have called for judicial interpretation. It is contended that the term "concealing" *ex vi termini*, imports a wrongful act, and so also it may be said of every act of a debtor, the effect of which would be to prevent his creditors from commencing an action against him—besides the statute couples it with the words "any other improper act," thereby showing that the concealment must be improper. But does it follow that every improper act of a party is fraudulent? If a debtor should improperly or even fraudulently attempt to conceal himself, but should so far fail in his attempt as to defeat the service of process on him, I apprehend it would be a matter of but little consequence to enquire into his in-

tention. Equally unimportant would be the enquiry into the intention of a party who continued concealed, so as to prevent the service of a process. I am led then to the conclusion that that construction should be given to the statute, which shall refer the question rather to the effect of a debtor's act than to his intention. The necessity is not perceived, of imposing the burden upon a plaintiff of establishing before a jury the existence of a fraudulent act in the mind of his debtor. An issue thus framed, would be less tangible than one upon the consequence of a party's act, and would not so well promote the ends of justice.

If the establishment of a fraudulent intention be a pre-requisite, cases might, and no doubt would arise, in which, notwithstanding the plaintiff had been prevented by the defendant's conduct, in bringing his suit, still he would be remediless.

It may be remarked, that although the statute is penal in its character, yet it differs materially in its operation from penal statutes generally; inflicting as it does its penalty on the plaintiff, for failing sooner to commence his action against his debtor. There being no forfeiture denounced against the defendant, he has not the same right as in a criminal prosecution, to require proof that his acts, unquestionably injurious to the interest of the plaintiff, were coupled with a fraudulent intention.

If the foregoing views be correct, then we think that the giving of the first instruction at the instance of the plaintiffs did not prejudice the defendant; although we regard the instruction as being without the statute.

The second instruction given, asserts nothing more than a legal truism, which the court might give or refuse at its pleasure, and its action would not be sufficient cause for reversing the judgment.

We are next to inquire whether the finding of the jury was against the evidence? In September, 1837, the plaintiffs sold the defendant a lot of goods, which were shipped to some town on the Illinois river where they were most probably not opened, for the evidence shows that in the same fall the defendant removed to Clay county, Missouri. He remained in that county, until the spring of 1839, when he removed to St. Louis county, and has continued to reside there ever since. In the spring of 1838, the defendant visited St. Louis, to replenish his stock of goods, but did not make it convenient to call and see the plaintiffs, and renew his acquaintance with them. During all this time, from the sale of the goods, until the fall of 1839, the plaintiffs were diligent in endeavoring to find out the residence of the defendant, and collect their

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claim from him, but their agent after having traversed the State of Missouri, and a part of Illinois, could gain no intelligence of him, so frequent and secret were his movements, as to leave no trace behind him. From this evidence the jury might well find their verdict under the issue submitted to them. The *intention* of the plaintiffs to avoid the forfeiture under the statute, is we think manifest, and they were only prevented from the commencement of their suit, by the wrongful conduct of the defendant.

Judgment affirmed.

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When a judgment by default is entered and the damages are unliquidated, if a writ of enquiry be awarded at the same term, notice should be given to the defendant of the day on which the enquiry will be executed.

APPEAL from St. Louis Circuit Court.

GEYER, for Appellant.

The appellant claims a reversal of the judgment of the circuit court on the following grounds :

1. The enquiry was executed at the return term of the case, which was irregular, the defendant having then no day in court. Rev. C. 1835, title, Practice at Law, art. 3, § 35; art. 7, § 10, 11 and 12.
2. If the enquiry of damages could be had at the return term, it must be upon a day previously appointed by the court, allowing sufficient time to the defendant to summon witnesses, and giving him notice of the day, either by an entry on the docket for the day or by notice served on him.
3. The court did not appoint a day for the inquiry in any mode of which the defendant could be required to take notice, the direction to the clerk, never entered of record, cannot be regarded now as an order of the court in this case.
4. The notice which the clerk was directed to give, and did give to the members of the bar, by writing put up in front of his desk, and his gratuitous list and entry on the docket, do not amount to notice, or place the cause upon the docket regularly.

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5. The inquiry of damages was had and made irregularly, on a day when the defendant was not required to be present; at a time of which he had no notice, which time was appointed without authority of law; by which irregularities and want of notice, the defendant was taken by surprise and is injured.

J. B. BOWLIN, in person.

The only question in this case, is whether the court erred in refusing to set aside the assessment of damages and judgment by default upon the affidavit of plaintiff in error; the defendant in error alleges, that it did not, and in support thereof submits:

1. That the motion comes too late, a judgment of non-suit may be set aside at any time during the *term* in which it is rendered. See sec. 32, Rev. C. p. 460. But a judgment by default can only be set aside at any time *before* the damages *shall be* assessed, not after:

2. The affidavit shows no diligence.

3. The affidavit shows no merits, but an aggravated case of getting hold of money as an auctioneer for another and keeping it. Revised Code p. 460, sec. 31 and 2; Greer vs. Goodloe, 7th Mo. Rep. 27; Wimer vs. Morris, same, p. 6; Field vs. Cathcart & Watson, 8th Mo. Rep. 686; LeCompte & wife vs. Wash, 4th Mo. Rep. 557.

SCOTT, J. delivered the opinion of the court.

This was an action of assumpsit brought by Bowlin against Evans on an account. Evans failing to plead in time at the return term of the writ, a judgment by default was entered against him. The entry of the default was in the usual form, and concluded with the words: "It is ordered that inquiry of the damages be made at the present term of this court, and the same time is given to the defendant." The default was taken on the 8th of May, and on the 1st of June following the writ of inquiry was executed, and damages to the amount of \$2,620 74 assessed against the defendant Evans. Afterwards, on the 5th of June, Evans filed a motion, accompanied with an affidavit, to set aside the judgment by default and the assessment of damages. The affidavit of Evans stated, that on the preceding Monday he was informed that a judgment by default had been rendered against him, but was not then informed, nor was there any entry on the record, as he believed, of the appointment of any day for the execution of an inquiry: that he was

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absent on the day of the execution of the inquiry, and had no knowledge that it would be executed on that day, or at any time without notice to him. After other matters, the affidavit further alledged, that Evans had paid sums amounting to \$1,500 on the account, the particulars of which were exhibited; and it was affirmed, that if an opportunity were offered him, he could establish his right to a credit for that amount." It appears there was no personal notice given the defendant of the time appointed for the execution of the writ of inquiry. The court, it seems, had directed the clerk to set all default and inquiry cases for the first of June, and to notify the members of the bar of such order, by a notice put up in the court room: that the clerk, not understanding the court to require the order to be entered of record, did not so enter it, but put up a notice in writing, to the members of the bar, in front of the clerk's desk in the court room, stating that all default and inquiry cases would be taken up for inquiry of damages on the said first day of June; and upon which notice was also set out each case of default and inquiry, to be taken up on that day, with the names of the attorneys, among which was this case; which notice and list were put up some week or more previous to the said first day of June. At the close of the regular trial docket, several cases of default were entered, among which was this case, over which were the following words: "default and enquiry cases for June 1st." Upon these facts, the court overruled the defendant's motion, to which exceptions were taken; and the defendant having filed an additional affidavit, in which he stated that he had spoken to counsel after the commencement of the suit, and wished him to defend the suit, saying that he owed the plaintiff nothing; and supposing the counsel spoken to would appear for him, he gave himself no further concern in relation to the cause; moved for a rehearing of the first motion, which being overruled, he appealed to this court.

It is contended for the plaintiff Bowlin, that under our statute, Revised Code, p. 469, sec. 31, an interlocutory judgment for failing to plead within time, can only be set aside for cause shown before the assessment of damages, and that after the execution of a writ of enquiry, a motion to set aside a default comes too late, and cannot be entertained by the court. It is conceived that the section of the statute above referred to, applies only to those cases in which the proceedings are all regular; moreover the inquisition can be set aside without affecting the judgment by default; and the principal relief the defendant Evans seeks, may be had on an execution of the writ of enquiry. The grievance of which the defendant complains is, that a writ of enquiry was ex-

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ecuted in an irregular manner, and under such circumstances as should have induced the court to set aside the assessment, and permit him to establish the credits to which he was entitled. So the merits of this controversy turn on the propriety of the action of the court in executing the writ of enquiry. The 35th sec. of the third article of the act concerning practice at law, provides that in cases of an interlocutory judgment, the damages, if unliquidated, shall be assessed by a jury, and every such inquiry of damages shall be made at the term next after the term in which such interlocutory judgment shall be rendered, unless the court direct it to be made at the same term. When we consider that a defendant by putting in a plea to an action, however false it may be, yet if good in point of form, entitles himself to a continuance as a matter of course, it may be doubted whether the legislature intended that a party who is unwilling to incur the expense of a plea, but acknowledging the plaintiff's right to recover, and intending only to reduce the damages claimed on the execution of the writ of enquiry, should be placed in a worse situation, unless for cause shown. If a court will, at the instance of the plaintiff, *ex mero motu*, direct an enquiry of damages at the return term, without the imposition of any conditions then the statute will be as though it had declared, that all writs of enquiry should be executed during the term at which the default is taken. It would seem that the statute contemplated that the general rule should be, that the assessment of damages should be made at a term subsequent to that at which the default was taken. The exceptions were those cases in which it might be otherwise directed. If a court will be so facile to a plaintiff as to direct that an assessment of damages shall be made during the term at which a default is taken, without any cause being shown or imposing any terms on him, should it not be equally facile to a defendant, who relying on the general rule of law, and supposing that a writ of enquiry will not be executed until a subsequent term, is disappointed in these expectations by its actions? Does not reciprocal justice require that as great facility should be shown the defendant in setting aside the assessment made under such circumstances, as was manifested to the plaintiff in having it made? This is no question of *laches*. The defendant had no day in court; he was not apprized in any legal manner of the steps taken against him subsequent to the default, consequently *laches* cannot be imputed to him in not resisting them, or making his defence at the time. If the general rule had been observed, and there had been a postponement of the assessment of damages to a subsequent term, the law provided a mode in which the defendant would have been notified of the time when it was

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necessary to appear and make his defence. Rev. C. p. 471, § 10. In departing from this rule, the court should have provided for the protection of the defendant, or if it failed to do so, should readily have retraced its steps when a *prima facie* case was made, showing that injustice had been done by a non-compliance with it. We do not intend to prescribe any rules as to the terms on which a plaintiff should be allowed to have an assessment of damages during the term at which a default is taken. That duty more properly belongs to the circuit court. We only maintain that when an assessment at the return term is directed in a case in which no reason is shown for such a direction, and no notice is given to the defendant, it should be set aside in order to let in proof of credits, to which it appears by his affidavit he is entitled.

We do not think that the notice set up by the clerk was legal. It does not appear that any rule of court directed in what manner assessment of damages should be made on defaults taken at the return term of writs. No court can speak but by its records. Nor is there any other evidence of its proceedings than its records. If the clerk omitted to make an entry, that omission might be supplied by an entry *nunc pro tunc*. But that has not been done, and the pretended notice of the clerk has no other foundation than the verbal direction of the judge. So as the record appears to us, there was no legal notice to attorney or suitors of the time of the execution of writs of enquiry. This view of the subject renders it unnecessary to say anything in relation to the second affidavit. It does not clearly appear from that affidavit that there was any retainer of counsel, and if there had been, for the reasons above given, the defendant should not have been deprived of the benefit of his motion.

The affidavits show no reason for setting aside the judgment by default; that will therefore remain. The inquisition of damages is set aside, and a new writ of enquiry is awarded.

The other judges concurring, the judgment is reversed and the cause remanded.

CITIZEN'S INSURANCE COMPANY OF MISSOURI vs. GLASGOW, SHAW & LARKIN.

This was an action upon a policy of Insurance. The policy was in the usual form of river policies; the perils insured against being those "of rivers, fires, enemies, pirates, rovers, assailing thieves, and all other perils, losses, and misfortune which should come to the damage of said Steamboat according to the general laws of insurance."

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Among the other warranties or agreements was the following: "It was also agreed that the assurers are not liable for any partial loss or particular average, unless such loss or average should amount to ten per cent. on the value of said boat or vessel; *nor should they be held liable for the bursting of boilers or breaking of engines, unless occasioned by external violence.*"

The letter of abandonment stated the cause to be that the boat had been nearly destroyed by the *late disaster*, and completely beyond repairs."

Held:

1. That although it might not be sufficient in the case of a *sea vessel*, to state the cause of the loss as "the late disaster," yet in the case of a steamboat, in which the boiler had burst, and many lives were lost, the Insurance Company having proceeded to act upon the notice, it is sufficient.
2. That the bursting of a boiler is a peril of the river.
3. The exception in the policy as to liability for bursting of boilers, or breaking of engine, to such as are caused by *external violence*, applies only to cases of partial, and not to cases of total loss.
4. The *external violence* intended by the policy, is violence external to the boat, and not merely external to the boiler.
5. A technical total loss is where the damage exceeds the moiety of the value of the thing insured. In estimating such a loss, on this policy, the boilers and engines are not to be taken into consideration.

APPEAL from St. Louis Circuit Court.

H. S. GEYER, for Appellant.

H. R. GAMBLE, for Appellees.

To generalize the questions in this case, before examining the instructions in detail, I submit the following propositions:

1st. That upon reason and authority a loss to a steamboat occasioned by the bursting of a boiler, is a loss covered by the policy. 11th Ohio Reports, 147.

2nd. That the construction of the clause in the policy, exempting the insurers from liability for bursting of boilers and breaking of engines, is, that the insurers in a case of partial loss, are not liable for the damage to the boiler bursting, or the engine breaking, without external violence, but that they are liable for all damage to the parts of the boat, other than the boiler bursting or engine breaking. This will appear by the language and connexion of the clause. 1 Phillips 642: 2 Ibid. 192.

3d. That the defects or unsoundness of a boiler, or any other part

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of the boat, which will discharge the insurer from liability for a loss, must be such as render her unfit for the purpose for which she is employed. Unseaworthiness is either the want of something that usually belongs to such a vessel, and which may be necessary for her safety, or such defect or unsoundness as renders her innavigable. 1 Philips 308, et. seq.; Taylor vs. Lowell, 3 Mass. Rep. 331; 11 Pick. 61. The question of seaworthiness applies to the beginning of the risk; 1st Philips 325; obligation to repair.

4th. That the insurers are not discharged by negligence or misconduct of the engineers or officers and crew, if the boat was provided with those who were competent in number and skill; 11 Peters 218; 11 Ohio 147; and the authorities referred to in the case of the St. Louis Insurance Company vs. Glasgow, Shaw & Larkin.

5th. That the abandonment in this case was sufficient if the facts warranted the insured in abandoning; 2d Philips 394, et seq., and was made in a reasonable time. Ibid 382, et seq.

6th. It was the right of the insured to abandon in case the loss amounted to fifty per cent, of the actual value of the boat at the time of the disaster; 2d Philips 271-273, et seq.

7th. In computing the loss, with a view to determine the right to abandon, the whole cost of restoring the boat to her former condition, including the expense of taking her to a port for repairs, is to be estimated; 2d Philips 285; 12th Peters 400; 2 Philips 115.

NAPTON, J., delivered the opinion of the court.

This case was originally an action of covenant, brought to recover upon a policy of insurance upon the steamboat Wilmington. By agreement, the pleadings were withdrawn, a declaration in assumpsit substituted, and the general issue pleaded.

The policy was in the usual form of river policies, the perils insured against being those "of rivers, fires, enemies, pirates, rovers, assailing thieves, and all other perils, losses and misfortunes, which should come to the damage of the said steamboat, according to the general laws of insurance." Among the other warranties or agreements, was the following: "It was also agreed that the assurers are not liable for any partial loss, or particular average, unless such loss or average should amount to ten per cent. on the value of said boat or vessel; *nor should they be held liable for the bursting of boilers, or the breaking of engines, unless occasioned by external violence.*"

The letter of abandonment was as follows:

"St. Louis, Nov. 26th, 1839. To the President, Directors, & Co. Citi-

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zens Insurance Company, St. Louis, Mo. Gent. The steamboat Wilmington having been nearly destroyed by a late disaster, and completely beyond repairs, you will please take notice that we abandon the said boat to your office, and look to you for indemnity on the portion of said boat insured at your office, under your marine policy, No. 1451. Very Respectfully, yours,

GLASGOW, SHAW & LARKIN."

Upon the trial it appeared that the Wilmington was a single engine boat of three boilers, requiring two engineers.

A short time previous to the loss, it was discovered that the middle boiler of the boat had been injured by burning, and it was accordingly repaired at New Orleans, by cutting out the burnt part and putting in a new piece, a mode of repair usual, and believed by the witnesses to be sufficient, if done well. After the boiler had been repaired, the boat with a full cargo, proceeded to St. Louis, and when about 600 miles from St. Louis, at or near a place called Alexander's wood yard, the middle boiler burst, whilst the boat was under way, throwing the two outside boilers overboard, and doing much damage to the engine and hull, and cabin furniture. The boat was set on fire by the coals thrown out from the furnaces, and also leaked very badly, so that it was difficult to keep her from sinking. Whilst in this condition the steamboat St. Louis came alongside, bound from New Orleans to St. Louis, and by the assistance of her officers and crew, the fire on the Wilmington was extinguished, and the leaks stopped, and the cargo re-adjusted; by a contract between the masters of the two boats, the Wilmington with the cargo was towed to St. Louis for twelve hundred dollars.

When the Wilmington reached St. Louis, she had ceased to leak, the cargo was discharged, and the notice of abandonment given.

Evidence was given in relation to the cost of repairs, including engine and boilers, which it is not material to notice; engineers were also examined in relation to the cause of the explosion, but no very satisfactory or definite opinion was expressed.

The defendants moved for the following instructions:

1st. The defendants are not liable for any loss or damage directly occasioned by the explosion or bursting of one or more boilers, or the breaking the engine of said boat, without any external violence.

2nd. The defendants are not liable for any loss or damage, solely and directly occasioned by the bursting of a boiler of said boat, without any external violence.

3rd. Unless the jury find from the evidence that at the time of the loss there were employed on the steamboat Wilmington, a competent number of skillful engineers, the plaintiffs are not entitled to recover.

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4th. Unless the jury find from the evidence, that at the time of the loss, the boilers and *engine* of the Wilmington was sound and sufficient, the plaintiff is not entitled to recover, unless the defect, unsoundness or insufficiency, could not have been remedied with reasonable diligence before the loss, or unless it appears, to the satisfaction of the jury, that the loss was not occasioned by such defect, unsoundness or insufficiency.

5th. The defendants are not liable for any loss or damage, occasioned by the bursting of any boiler, or breaking of the engine of the Wilmington, if it appears to the satisfaction of the jury, that such bursting or breaking was caused by any defect or unsoundness of said boiler, or by the misconduct, unskillfulness, or gross negligence of any engineer of the boat, or person acting as such at the time.

6th. The defendants are not liable for any loss or damage directly occasioned by the gross negligence, or misconduct of the master, or any of the officers or crew of the steamboat Wilmington.

7th. Unless the jury find from the evidence, that the damage to the steamboat Wilmington, her tackle, apparel and furniture (exclusive of the engine and boilers) amounted to ten per cent, of the whole value of the boat, they ought to find for the defendants.

8th. If the jury find from the evidence, that there was no abandonment, in reasonable time, or that an insufficient abandonment was made and not accepted, the plaintiffs cannot recover as for a total loss, if the vessel was saved and might have been repaired.

9th. The defendants are not liable for any loss or damage to the engine or boilers of the steamboat Wilmington, occasioned by the bursting of a boiler, or breaking of the engine of said boat, without any external violence.

10th. The plaintiffs are not entitled to recover any damages for injuries done to the engine by the breaking thereof, or to any of the boilers, by the bursting of any one or more of them, if such bursting or breaking was not caused by external violence.

11th. The written notice of abandonment in this case, is not sufficient to entitle the plaintiffs to recover, as for a total loss.

12th. If it appears to the jury that any part of the property insured (other than the engine and boilers) was saved, the plaintiffs are not entitled to recover as for a total loss, unless the jury also find that the plaintiffs within reasonable time, after notice of the loss, made an abandonment to the defendants, and that the loss or damage to the property insured (other than to the engine and boilers) exceeded fifty per centum of the value thereof.

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13th. The notice of abandonment given by the plaintiffs to the defendants, is not sufficient, unless at the time of giving such notice, the plaintiffs made known to the defendants the grounds and reasons of the abandonment, or unless the abandonment was accepted by the defendants.

14th. An abandonment of the property saved, including the engine and boilers, with a claim of indemnity for the whole loss, is not such as the defendants were bound to accept, and if not accepted does not entitle the plaintiffs to recover, as for a total loss, even though the damage to the property, exclusive of engine and boilers, exceeded one-half the value.

15th. Unless the property covered by the policy was damaged by a peril insured against to more than one-half the value of such property, as fixed by the policy, the loss is partial only.

16th. It being admitted by the parties, that the loss and damage in the declaration mentioned, were occasioned by the bursting of a boiler, and breaking of the engine, without external violence, the value of the engine and boilers, and the damage thereto, are to be excluded in all valuations of the property insured, and ascertainment of loss, as if they had not been included in the policy.

17th. If under the foregoing instructions, the jury find a total loss, the loss of the plaintiff will be the sum insured, deducting therefrom three-sixteenths of the value of the engine and boilers, at the date of the policy, and three-sixteenths of the value of all the property saved, except engine and boilers.

18th. If the jury, under the instructions, find the loss to have been partial only, the loss of the plaintiff will be three-sixteenths of the costs of repairs (including the engine and boilers,) and deducting one-third of the costs of repairs.

19th. The defendants are entitled to an abatement of two and a half per cent. on the amount of loss sustained by the plaintiffs.

20th. If the sale of the property saved was made by the plaintiffs, or their order, without the consent of the defendants, such sale is no evidence against the defendants, of the value of the property sold: the last two of which instructions the court gave, but added thereto the following instruction:

21st. A sale made without collusion in the ordinary mode in which such sales are made, is evidence to be weighed by the jury, but is not conclusive against the defendants.

To the giving of which instructions, so added, the defendants excepted.

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The defendants then moved the court to instruct the jury as follows :

22nd. If the jury find from the evidence, that the loss was occasioned by the bursting of a boiler of the steamboat *Wilmington*, and that said boiler was at the time unsound, defective, or insufficient, the plaintiffs are not entitled to recover, unless it appears to the satisfaction of the jury, that such defect, unsoundness or insufficiency, could not have been remedied before the loss, by the use of reasonable diligence on the part of the assured and their agents.

23rd. If the jury find from the evidence, that any part of the property, insured against the perils by which the loss was occasioned, was saved and might have been repaired, and that the value of such property, when repaired, would be equal to double the cost of repairs, the loss was partial only, and could not, by abandonment, be converted into a total loss, unless such abandonment was excepted.

The verdict and judgment were against the defendant.

One of the errors assigned in this case, is the insufficiency of the notice of abandonment. It is not contended by the plaintiffs in error, that this need be in any particular form,, but it is insisted that this notice wants an essential requisite, to-wit, the assignment of a sufficient cause for the abandonment.

The notice of abandonment must be absolute, and must assign the true cause, and a sufficient one to authorize the abandonment. 2d Phil. Ins. 394-5. In a case of Marine Insurance, (*Hazard vs. N. E. Marine Insurance Co.*, (1st Sumner 221,) Judge Story declared it to be his understanding of the law, that in an abandonment, the cause of the loss must be stated, so that the underwriter may know whether it is a loss by peril within the policy. No objection to the notice in the present case, can be urged, for not sufficiently indicating the plaintiffs' intention to make an absolute abandonment. The language in this respect is clear and unequivocal. The cause of the abandonment is also very distinctly stated to be the destruction of the *Wilmington* "*by the late disaster.*" Had the *Wilmington* been a sea vessel, such an expression might afford but little information to the underwriters, as to the causes of the disaster, and no doubt would have been entertained of the insufficiency of the notice. Under the circumstances of this case, however, we might well hesitate in applying the strict rule laid down by Judge Story. The *Wilmington* was a steam vessel navigating the waters of the Mississippi; by the explosion of a boiler it was partially destroyed, and many lives were lost; it was towed up to the port of St. Louis, where the office of this Insurance Company was kept; after which, notice of abandonment was given, and immediately upon receiv-

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ing it, the company caused a thorough investigation into the condition of the boat. Might we not well presume, that under such circumstances, a reference to "*the late disaster*" fully apprised the company of the nature and cause of the loss? The reason of the law ceasing, must we still insist on its observance?

Passing by this point to others of more consequence, we proceed to consider the proper construction of the policy, about which the controversy has mainly arisen.

The first question which arises upon the policy, is whether a loss occasioned by the explosion of a boiler, is within the enumerated perils. The form of the policy is the same which has been used in Marine Policies, and the perils enumerated are the same. They are "of the rivers, fires, enemies, pirates, rovers, assailing thieves, and all other perils, losses and misfortunes, which should come to the damage of the said steamboat Wilmington, according to the general laws of insurance." It is remarkable, considering the numerous losses arising from this cause in the navigation of the western waters, that but one case can be found in which this question has been decided. That is the case of *Perrin's Adm'r vs. the Protection Insurance Company*, 11 Ohio Rep. 147. The supreme court of Ohio, in that case were of opinion, that the policy covered a loss occasioned by explosion. The court seemed to consider that this was a peril incident to the navigation of a river by steam vessels, as much so as a loss by wind would be a peril of the sea, to which vessels propelled by that element are liable. It is no answer to this view of the subject, to say that a peril by steam is not peculiar to the water, but may happen on land as well as at sea, for the same may be said in relation to the dangers arising from the violence of the winds. An injury to the motive power of a sea vessel by inevitable accident, is admitted to be within the enumerated perils of a marine policy; for the same reason, an injury to the motive power of a steam vessel arising from inevitable accident, is within the perils of the river incident to such vessels. If steam were a power entirely within the control of man, the conclusion would be different. But I apprehend that whatever natural philosophers may think of this, the elements which combine to create the power of steam, are as entirely within the reach of accident, and are no more subject to fixed laws than the elements which propel the ship at sea. Whatever may be the theories on either subject, universal experience is that no human skill can entirely guard against accidents, either in the one case or the other. We think, therefore, that the doctrine of the supreme court of Ohio is reasonable and right.

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Assuming then that the explosion of the boiler is a peril within the policy, what construction shall we give to that clause which exempts the underwriters from responsibility "for the bursting of boilers or the breaking of engines, unless occasioned by external violence?" Was this clause intended to constitute a limitation of the risks enumerated? Is it a fair construction of the policy, that the underwriters by this clause intended to limit their responsibility for losses by explosion, to such cases of explosion only as might be caused by external violence.

It must be admitted that this construction of the clause is the most obvious one, but upon a careful examination of the whole policy, taking it altogether, we are forced to the conclusion, that it is not the correct one.

If the underwriters intended to their responsibility for the peril of explosion, to such peril when occasioned by external violence, it would have been most material to have placed such limitation in the same portion of the policy in which those perils are enumerated. It is in this part of the instrument that the assured would look to see what were the perils against which he was insured. The clause in relation to the breaking of engines and bursting of boilers, is found among the enumeration of partial losses. Immediately preceeding it, is the statement that the underwriters are not responsible for partial losses, unless they amount to ten per cent. Immediately following is the clause which exempts anchors and cables from the policy, unless lost by stress of weather. The maxim "*nos citur a sociis*" then applies.

Moreover, if this clause had been designed as a limitation of the perils mentioned in the policy, why should the *breakage of an engine* be connected with the bursting of a boiler, so as to exempt the company from responsibility in either case, whether the loss was total or partial? The bursting of a boiler might in many instances produce a total loss, and would, I apprehend, in most cases produce a technical total loss; whereas the breaking of an engine from mere internal defects or mismanagement, could never produce a total loss. The breaking of an engine *per se* is not a loss insured against, it must be occasioned by some of the perils insured against to bring it within the policy. The explosion of a boiler is a peril insured against. To say then that the explosion of a boiler unless produced by external violence shall not make the underwriters liable for the consequences of that explosion, though a total destruction of the boat is produced, is well enough, if such were the intent and understanding of the parties. But to say further that the breaking of an engine, unless occasioned by external violence, shall not be paid for in a case of total or partial loss, seems to have no connection whatever with the previous propo-

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sition, if we understand that proposition to be designed as a limitation upon the risks specified in the general clause, usually appropriated to that subject.

We understand then the exemption of the boilers and engine, as limited in cases of partial loss. The clause would then read "the assurers are not liable for any partial loss or particular average, unless such loss or average shall amount to ten per cent., nor in case of partial losses shall they be liable for the bursting of boilers or the breaking of engines, unless occasioned by external violence." Where there is a total loss in a valued policy, all questions in relation to cables, anchors, partial losses, &c., are excluded. The assured look to their policy, and enquire only whether the loss has been occasioned by a peril insured against. Upon this construction, if the boat were totally destroyed, the assurers would have been liable to the amount insured, including boilers and engine.

A difficulty however arises under this construction, in ascertaining a technical total loss, so as to authorize an abandonment. A technical total loss, is where the damage sustained exceeds the moiety of the value of the thing insured. The question then arises, whether in estimating the amount of loss, the engine and boilers must be included in the estimate. It has been before observed that the underwriters are not responsible for a partial loss, occasioned by the breaking of engines or bursting of boilers; and therefore, if in ascertaining a technical total loss, for the purpose of abandonment, the value of the engine and boilers is taken into the estimate, the underwriters are thereby made indirectly responsible for a partial loss, against which their contract protected them. The engine and boilers then, where they are injured by any cause other than external violence, must be excluded from the estimate. It is like the case of a policy in which there are memorandum articles, that is a portion of a cargo, for any deterioration of which the underwriters are not responsible, except in the event of their total destruction. In ascertaining whether a total technical loss can be claimed, all injury to the memorandum articles is excluded from the estimate. *Marcadier vs. Chesapeake Insurance Company*, 8 Cranch, 39.

It is contended however, that the exploded boiler alone is to be exempted from the policy, and that the other two boilers which were thrown overboard by the explosion, and the engine which was broken, are to be included in the estimate of loss. This is based upon the idea that the terms "*external violence*" used in the policy, mean a violence external to the engine which breaks, or the boiler which bursts. This

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interpretation of the words "external violence" seems rather too refined; for if this be their true import, might there not be some plausible ground for the idea, that the bursting of a boiler always is produced, at least remotely, by some external violence, such as the intensity of heat in the furnace? We suppose the external violence mentioned, means a violence *external to the boat*, such as striking a log, rock or sandbar, or collision with another boat. In this case the injury to the boilers and engine was not, as it is admitted, occasioned by a violence external to the boat, and therefore they should be excluded from the computation of a total technical loss.

We do not advert particularly to the instructions in this case, as we believe most of them involve the same questions which we have already considered. Those which relate to the question of negligence, have been considered and determined by this court in the case of the St. Louis Insurance company vs. Glasgow, Shaw & Larkin, 8 Mo. Rep. 713.

In relation to the propriety of charging the Insurance Company with the expense of bringing the boat up to St. Louis, we see no objection to the instruction of the circuit court on this point. If the cost of towing the boat were increased by the fact of her having a full cargo aboard, the underwriters were not responsible for such increased expense. We do not recollect that there was any evidence to show how this was, if there were any it would be proper for the jury to make such discrimination.

The other judges concurring, the judgment is reversed, and the cause remanded.

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1. It is the duty of the appellant to show by the record that error had been committed. And if a record be susceptible of two interpretations, that will be given which will sustain the judgment of the inferior court.
2. Sworn copies of written instruments are admissible, when the originals are beyond the jurisdiction of the court.
3. A certificate of deposit to "S. B. Knapp, Cashier," although the funds deposited be shown to belong to the Bank of which he was cashier, may be transferred by Knapp. And when transferred, even in bad faith by Knapp, if they come in the hands of an innocent holder, he will hold them against the Bank.

Van Arsdale & Warnock vs. John M. Krum, Judge, &c.

4. A foreign corporation may be sued in the courts of this State by attachment.
5. A corporation may be summoned as a garnishee, and its answer be verified as in chancery.
6. A garnishee can take no advantage of any error in the proceedings against the defendant, if the court have jurisdiction of the cause.

APPEAL from St. Louis Court of Common Pleas.

GAMBLE & BATES, for Appellants.

POINTS AND AUTHORITIES.

1. The court erred in admitting the copies of instruments annexed to the deposition of Jones. There was no evidence offered of any thing to prevent the production of the originals.

2. The court erred in permitting the plaintiff to read in evidence the record from New York; and this error is not cured by the court afterwards on the plaintiff's motion, telling the jury that the record was not before them.

3. The court erred in giving to the jury instructions that were directly contrary to each other, and which were calculated to mislead the jury.

4. The burden of proving the right of the defendant (the Mineral Point Bank) to the effects attached, at the time they were attached, rests upon the plaintiff, as is asserted in the 2d instruction given for the garnishee, and is not to be presumed, as is asserted in the 8th instruction given for the plaintiff. *Scott & Rule vs. Hill & McGunnegle*, 3d Mo. Rep. 88.

5. The form in which the certificates of deposit were issued, being to the order of Knapp, Cashier, did not of itself, nor even accompanied by the fact, that the Bank or its agents had possession of the certificates, constitute the Bank the creditor of the garnishee without proof of other facts; and especially with the admission that the money deposited was not previous to the deposit, the money of the Bank, as in the defendant's third instruction, is supposed. Even if the funds deposited actually belonged to the Bank, that fact could only give to the Bank an *equitable* not *legal* title to the certificates; and attachment being "*stricti legis*," an equity is not attachable.

6. The funds of Samuel B. Knapp, as an individual, did not by the mere act of deposit to the credit of the owner, the Cashier of the Bank,

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become the property of the Bank, as is asserted in plaintiff's 6th instruction.

7. The attachment in this case did not cover any indebtedness of the garnishee to the Mineral Point Bank, which might have arisen by the Bank *becoming the owner of the certificates of deposit, after the attachment was levied*; and moreover such case was not embraced in the issue, and therefore plaintiff's seventh instruction should not have been given. Rev. Code of 1835, p. 77, last clause of sec. 6.

8. If the funds deposited, and the certificates of deposit had been the property of the bank, still if by the laws of Wisconsin, where the bank was located, the certificates and the rights evidenced thereby had become vested in receivers appointed under the laws of that territory, before the attachment in this case was levied, and such receivers there had the lawful and rightful possession of the certificates, the issue should have been found for the garnishee. Story's Conflict of Laws.

9. The court ought to have granted a new trial. The evidence upon the subject of the ownership of the certificates of deposit, is all on one side, being all given by the plaintiff; and that evidence instead of showing the bank to be the owner at the time of the attachment, shows that they were passed to Brooks.

10. The court should have discharged the garnishee, notwithstanding the verdict, or should have arrested the judgment, which in this case is the same thing. This point turns on the effect of the judgment recovered by Little & Co. in New York, which is set up in the answer and not denied.

11. The court erred in admitting parol evidence and in refusing to strike it out of the deposition of the appointment of receivers or trustees of the bank.

12. The defendant being a corporation aggregate, existing in a foreign jurisdiction, is not sueable here by attachment. 16 John. Rep. p. 6; McQueen vs. Middletown Manufacturing Company.

13. Moreover, at the time of the bringing of this suit, the said bank was defunct, and not capable of being made a defendant, so as to warrant a proceeding against a garnishee.

14. The St. Louis Perpetual Insurance Company being a corporation aggregate, is not liable to be made, and is legally incapable of being a garnishee under our attachment law. It cannot be summoned except in the particular way pointed out by law. See R. C. title, Corporation. It cannot answer on oath, as required by the act; and if it refuse, cannot be compelled to answer at all.

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GEYER, for Appellee.

POINTS AND AUTHORITIES.

1. The question attempted to be raised by the appellant, whether a corporation aggregate can be sued as defendant, or summoned as garnishee in attachment, is not presented by the record in this case. The appeal does not bring up for review the record and proceedings in the principal action. A garnishee cannot take advantage of irregularity in the proceedings between the parties to the action. 6 Porter's (Ala.) Rep. 265; 5th Alabama Rep. N. S. 414. No question was made in the court below, involving the question of liability of the defendant to the proceedings by attachment, except in overruling the motion of a stranger, and even that decision was not excepted to; and therefore that decision is not the subject of review. *Butcher vs. Keil et al.*, 1st Mo. Rep. 187; *Swearingen vs. Newman*, Adm'r 4 ib. 456.

There was no plea to the jurisdiction of the court, and no claim to exemption by the garnishee in the court below, until after submission to answer and a verdict for the plaintiff, which was too late. Again: It does not appear that either the defendant or garnishee was a corporation aggregate, foreign or domestic; and if it did, there is no assignment of error on the decision of the court, in respect to the liability of the defendant or garnishee as a corporation to attachment or garnishment.

2. Even if the record and assignment of error shall be understood to bring up the question of the liability of a foreign corporation to attachment, or of a domestic corporation to garnishment, the judgment against the garnishee cannot for that cause be reversed. A foreign corporation is liable to be sued in any State, where service of process can be made upon it or its property according to the laws of such State. *Lebby vs. Hodgdon*, 9th New Hamp. Rep. 394. An attachment may be levied on its property found in the State. *Bushel vs. Commercial Insurance Company*, 15th Sergt. & R. 173; *Knox vs. Protection Insurance Company*, 9th Conn. Rep. 430. A corporation, foreign or domestic, may be held as trustee or guardian. 9 N. H. Rep. 394-9; Com. Rep. 430. If the law requires the garnishee to answer on oath, a corporation garnishee verifies its answer by the corporate seal. *Callahan vs. Hallowell*, 2d Bay, 10.

3. The first assignment of error is the admission of incompetent evidence offered by *the appellant*, an error of which the *appellant* cannot complain. The ruling of the court below in the admission of evidence,

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offered by the appellee, is not assigned for error, and consequently not subject to review.

4. It does not appear by the record that any incompetent evidence was given on the part of the appellee. The record of the court in New York was exhibited by the garnishee in his answer to part thereof, and properly read to show the time of the commencement of the suit; and this is all the effect given to it, as will be seen by the instructions given to the jury. What the witnesses say of the appointment of receivers, is merely an explanation of the nature of the possession of the certificates, and negatives any presumption that might otherwise arise that they claimed in their own right. It is not an attempt to prove their authority, or the contents of a commission or other writing. It does not even appear that there was any written or record evidence of the appointment, a fact which, if it existed, the objecting party was bound to show. That part of the evidence objected to which describes the certificates seen in possession of the receivers, was clearly competent: it was not evidence, nor offered as evidence of the contents of a writing, or its purport or effect, but of description, for the purpose of identifying them. As to the copy of the agreement appended to the deposition, it was clearly admissible as secondary evidence, it appearing that neither the original nor its keeper was or is within the power of the plaintiff, or within the reach of the process of the court.

5. The objections to evidence in the court below were too general. "Where an objection is made to the introduction of evidence, the bill of exceptions should state the specific grounds upon which the objection is made; for unless the party points out the specific objections in the circuit court, and the bill of exceptions shows what those objections were, the case may be decided in one point in the circuit court and reversed on another in the supreme court." *Fields vs. Hunter*, 8th Mo. Rep. 128. The rule which requires the specification of the objections, applies with great force to cases where particulars might be supplied.

6. The second assignment of error is too general and indefinite to be available to the plaintiff. It alleges misdirection generally, without any reference to the instruction complained of, and upon the supposition that instructions were given at the request of both parties, the assignment of error comprehends both, without distinction, or neither.

7. It does not appear that any instructions prayed for by the plaintiff, and given, were excepted to in such manner as to make the error (if any) therein available to the plaintiff. The bill of exceptions shows that the instructions, eight in number, were excepted to, and the exception both *overruled and allowed*. Thus the exception destroys it-

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self, and is of no avail. Nothing can be intended in favor of the party excepting. Where a bill of exceptions is doubtful and ambiguous, the court will not intend any thing for the benefit of the party whose duty it was to make the matter plain. *Collins vs. Bowmer*, 2d Mo. Rep. 158. The interpretation of the bill of exceptions, most favorable to the appellant, would be that the three last of the eight instructions were refused, and the five first given. This may be inferred, if any intentment is allowed from what follows the exceptions in the bill.

8. Mere misdirection, or admission, of incompetent testimony, is not of itself sufficient to authorize the reversal of the judgment, if upon the whole case it appears to have been given for the right party. *Newman vs. Lawless*, 6 Mo. Rep. 301; *Neal vs. McKinstry*, 7 Mo. Rep. 128; *Finney et al. vs. Allen*, 7 Mo. Rep. 416; *Vaulx vs. Campbell*, 8th Mo. Rep. 224. This acknowledged principle applied to the case at bar will affirm the judgment.

9. The decisions of the court in giving and refusing instructions were substantially correct, and the verdict and judgment according to the merits of the case. That the funds deposited were at the time of the deposit the property of the defendant in the action, is established by the evidence and found by the jury: that they continued to be the property of defendant, is determined by the law of the case and the facts in evidence.

First, The fact that the funds when deposited were the property of the defendant, is evidence that they continued such, unless the contrary be shown. The case of *Scott & Rule vs. Hill & McGunnege*, 3d Mo. Rep. 88, was decided by a divided court, and the weight of reasoning is decidedly with the dissenting judge. The opinion is by its terms applicable only to negotiable instruments. In the case at bar, there is no such instrument. It is properly not transferable, except by delivery, or by a transfer on the books of the defendant as equivalent to a delivery.

Second, Assuming that this case is within the principle of the case of *Scott & Rule vs. Hill & McGunnege*, it is sufficient to show that the possession was in persons claiming to hold for the defendant and not in their own right, especially when according to the facts appearing they could have no right to hold. If the garnishee intended to affirm that the possession divested the title of the defendant, it was incumbent on it to prove that the receivers were duly appointed such.

Third, The receivers had no authority under their appointment to transfer the funds, or bargain with others touching them; and if they

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had, they did not make any valid transfer until after the attachment levied.

Fourth, Even if a complete record of the appointment of the receivers, and a compliance of the law on their part may be presumed under the state of the case, still there was no transfer of property in this State as against an attaching creditor. The effect of the proceeding under the law of Wisconsin, is the same as that of a commission in bankruptcy and an assignment under bankrupt laws, in which the attachment has priority. 2 Kent's Com. 404; Blake vs. Williams, 6 Pick. 284; Oliver vs. Town, 14 Martin, La. Rep.; 6 Binney, 353; Robinson vs. Crowder, 4 McCabe, 519. See also Story's Conflict of Laws.

10. There was no motion for a judgment *non obstante veredicto* to be overruled, and therefore there is no ground for the assignment of error which complains of the overruling such motion. The motion to discharge the garnishee and in arrest of judgment are equivalent, and raise the same questions, and bring under review the same part of the record and facts admitted and found. In denying these motions there is no error. The allegations and interrogatories are sufficient in law. The pleadings admit the judgment in New York, which being in an action commenced after the attachment levied, is no bar to the recovery against the garnishee. The verdict determines that the funds were at the time of the attachment levied, the property of the defendant and the value thereof. The record, therefore, warrants the judgment. Whether a foreign corporation can be sued in attachment, or a domestic corporation summoned as garnishee, is not a question involved in either motion; and if it had been, was correctly decided for the reasons and upon the authorities above given and referred to.

11. The merits being with the plaintiff below, as already shown, there is no pretence for a new trial, and the motion of the appellant was properly overruled.

CROCKETT & BRIGGS, for Appellee.

POINTS AND AUTHORITIES.

1. There is no proof that receivers were ever *legally* appointed by any competent tribunal in Wisconsin, to wind up the affairs of the Mineral Point Bank.

2. That if receivers were legally appointed by the authorities of Wisconsin, prior to the garnishment, and as such the receivers had the custody of the certificates of deposit, nevertheless the fund which was due upon the certificates, being found in this State, and subject to our laws,

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was liable to attachment by creditors of the bank, not citizens of Wisconsin. *Ogden vs. Saunders*, 12 Wheaton, 358, &c.

3. That although upon their face the certificates were payable, on *their return* to the office of the garnishee, the fund was liable to attachment in the hands of the garnishee, notwithstanding the attaching creditor had not the custody of the certificates, and though they may never be returned. If this be not the law, no fund can be reached by attachment, where the garnishee has an outstanding obligation for the debt.

4. That although the money which was deposited by Knapp, and for which the garnishee issued certificates of deposit to him as cashier of the Mineral Point Bank, may not before the deposit, have belonged to the Bank, yet when deposited by Knapp, to his own credit as *cashier*, it became the property of the Bank, so as to create the relation of debtor and creditor between the garnishee and the Bank.

5. That Cohen, by his attachment, acquired a lien upon the fund from the date of the service of the garnishment, and that no subsequent transfer by the Bank, its officers or agents, of the certificates of deposit, can impair this lien, and especially as the certificates were payable *in currency* and therefore not negotiable, on a footing with bills of exchange. *Farwell vs. Kennett*, 7 Mo. Rep. 595.

6. That Cohen's lien having attached, the transfer of the certificates to Brooks, conferred no title, and having no title, his subsequent recovery of a judgment in New York, against the garnishee, does not operate a divesture of Cohen's lien, and consequently the judgment in New York, is no bar to Cohen's recovery. 13th Pickering 511; *Sargeant on Attachment* 145; *Embree & Collins vs. Hanna*, 5 John. 101.

7. That at the date of the garnishment, Brooks had acquired no title to the certificates:

First, Because there is no proof that the receivers, (so called) and under whom Brooks claims, had any legal authority to make the transfer.

Second, Because at the date of the garnishment there being *three* Receivers, only *one* of them had made the transfer to Brooks, subject to the ratification of the other two, and these two so far from ratifying, repudiated and annulled the contract, and subsequently—long after the garnishment—entered into a new contract with Brooks.

Third, Because at the date of the garnishment, only one of the Receivers had made the transfer to Brooks, and their powers, if they had

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any, being joint, less than a majority could perform no act to bind the assets of the Bank.

Fourth, Because the proof shows that the transfer from Banks, one of the receivers, to Brooks, was made subject to the ratification of the other two, and at the date of this garnishment, this ratification had not only not been made, but they had actually disaffirmed the contract.

8th. That whether the fund at the date of the garnishment, was the property of the Bank, or had become the property of Brooks, was a question of fact for the jury, who found the issue in favor of Cohen, and the court will not now disturb the verdict, unless plainly against the weight of evidence, which it is not.

9. That the statement of Jones & Bequette, two of the witnesses, as to the appointment of receivers, cannot be objected to by the garnishee now :

First, Because it does not appear in proof that the appointment was made in writing or of record.

Second, Because these statements were made by way of inducement and explanation only.

Third, Because this portion of the evidence did not tend to the benefit of Cohen, or to the injury of the garnishee; on the contrary a chief branch of the garnishee's defence were based exclusively upon these statements.

10th. That the copies of the contracts annexed to the deposition of Jones, were improperly admitted in evidence.

First, Because the originals were properly in the custody of the witness, and so far as the proof shows, were his private papers, of which he was entitled to retain the custody.

Second, Because the witness was out of this State, beyond the reach of the process of our courts, and therefore could not be compelled to produce the originals, upon "*supæna duces tecum.*" Boone vs. Dyke's legatees, 3 Mon. R. 532; Bailey vs. Johnson 9 Cowen 115; May's Adm'r vs. May, 1 Porter Rep. 229; United States v. Reyburn, Peters Rep. 352; 13 John. Rep. 58.

11th. That the certificates having been accurately described in the answer of the garnishee and their existence admitted, it was competent for the witness Jones, to speak of them for the purpose of identifying them, and by way of inducement, without producing them, and especially as the answer of the garnishee shows that they were not in the power of the party.

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SCOTT, J. delivered the opinion of the court.

Cohen, the appellee, brought suit against the President, Directors, and Company of the Bank of Mineral Point, and summoned the St. Louis Perpetual Insurance Company, the appellant, as garnishee. The service of the garnishment was made on the 24th Nov. 1841. To the usual interrogatories, the Insurance Company filed the following answers: This garnishee for answer to the allegations of the plaintiff says, that at the time this garnishee was summoned in this case, this garnishee had not, nor has it since, nor has it now in its possession, custody or charge, any lands or tenements, goods or chattels, moneys, credits or effects, belonging to the said defendant; nor has it since been, nor is it now indebted to the said defendant, in any amount whatever, except as may be hereafter in this answer stated. This garnishee to the first interrogatory answers: That at the time the garnishee was summoned in this case, it had no lands or tenements, goods or chattels, rights, moneys, credits or effects in its possession, custody or charge, belonging the defendant, nor has it at any time since had. To the second and third interrogatories, this garnishee answers: That at the time it was summoned in this case, it was not indebted to the said defendant in any sum of money, nor has it since been, nor was it, nor has it since been bound to the defendant in any contract for the payment of any sum of money not yet due, except as hereinafter stated. This garnishee says, that on the seventeenth day of May, in the year eighteen hundred and forty-one, Samuel B. Knapp, who was then cashier of the Bank of Mineral Point, deposited with this garnishee the sum of nine thousand two hundred dollars, and received from this garnishee five certificates of deposit; one for five thousand dollars, one for one thousand dollars, one for eleven hundred dollars, one for twelve hundred dollars, and one for nine hundred dollars, all dated the said seventeenth day of May at St. Louis, in each of which it was certified that S. B. Knapp, Cashier, had deposited in the office of this garnishee, the sum in each certificate specified, to the credit of S. B. Knapp, cashier, payable to his order on the return of that certificate; that for five thousand dollars being payable one month after date, and all the others payable one day after date. *"One of which said certificates is payable in Kentucky bank notes, and all the others are payable in current bank notes."* This garnishee further answers, that since the above mentioned certificates were given, they have been negotiated as this garnishee has been notified, and they are now held by a firm in the city of New York, but this garnishee is not informed

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who was the owner of the said certificates, at the time this garnishee was summoned in this case. This garnishee leaves this question to be decided by the proper tribunal, whether the money thus deposited is subject to the attachment in this case, and requires the proof of all the facts which will authorize a judgment to be entered against this garnishee. This garnishee states, "that the certificates before mentioned, have been presented at the office of this garnishee for payment, by the agents of the firm of Jacob Little & Co. in New York, and payment was refused by this garnishee, because of the pendency of the attachment in this suit, and the said Little & Co. have commenced a suit thereon in the city of New York, against this garnishee, and have attached the funds of this garnishee in that city, to the amount of said certificates;" and afterwards on leave filed the following additional answer: "This garnishee further answering the said interrogatories and allegations says, that since the filing of its original answer in this cause, the suit which at that time was pending against this garnishee, and mentioned in said answer as pending against it in the city of New York, in the name of Jacob Little & Co. that is, Jacob Little & Edward Little, has been prosecuted to final judgment, and such proceedings were therein had, in the supreme court of judicature of the people of the State of New York, that final judgment was rendered in said court against this garnishee in the said suit, for the sum of ten thousand nine hundred and seventy-nine dollars and sixty cents, including the damages, costs and charges, which appears by the record of the said suit remaining in the said supreme court, an exemplification of which is herewith exhibited, whereby it appears that said judgment for the amount aforesaid, was signed on the ninth day of May, in the year 1844.

Afterwards a jury was sworn and the following deposition was read on the part of the plaintiff: David Walter Jones, of lawful age, being sworn and examined on the part of the plaintiff, deposeth and saith: "I know James W. Doughty, the plaintiff. I was at one time an officer of the Mineral Point Bank, was President of the Mineral Point Bank, for about two years previous to December, 1840—in December 1840, I sold my stock in said bank, and ceased to have any further control as an officer of said bank. I however transacted business for Samuel B. Knapp, then cashier of said bank, during the winter of 1840 and 1841. Chief Justice Dunn, appointed Paschall Bequette, John Dunn and William H. Banks, as trustees or receivers, to wind up the affairs of the bank. On or about the 24th of September, 1841, I was present with two of the receivers, namely Bequette and Banks, when they entered

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into an arrangement or compromise with Samuel B. Knapp. They, the receivers, had in their possession at that time five certificates of special deposit of the St. Louis Perpetual Insurance Company, dated 17th of May, 1841,—the deposits were made by Samuel B. Knapp, cashier, to the credit of himself. One for nine hundred dollars, one for one thousand dollars, one for eleven hundred dollars, one for twelve hundred dollars; amounting in the aggregate to four thousand and two hundred dollars, which four were payable one day after date, and one for five thousand dollars, payable one month after date, all of them signed J. Smith Homans, cashier of the St. Louis Perpetual Insurance Company, numbered 354, to 358, inclusive. Knapp was present and claimed these certificates as his property, the receivers at the same time claimed them as the property of the bank; he Knapp and the receivers, then entered into an arrangement in my presence, by which Knapp was to have the certificates before described, on his giving approved security to the receivers, for the payment of seventy thousand dollars and upwards, of the bills of the bank of Mineral Point, or of the indebtedness of the bank, for which Knapp was, or pretended to be, individually responsible, within six months from the date of agreement. I don't know whether Knapp gave the security, but Banks, one of the receivers; told me while we were in Rochester, that he had settled the difficulty with Brooks, and Banks also told me that Brooks had got possession of the certificates. The said certificates were held by the receivers on the 24th September, 1841, as the property of the bank, and were retained as such property, until the arrangement with Brooks, which took place in October, 1841. I do not know where the certificates are now, nor do I know of any person claiming them or having possession of them at this time. I know nothing further in relation to the matter, save what is contained in the article of agreement, and transfer or ratification of a former transfer, entered into on the 25th February, A. D. 1843, by and between Paschall Bequette and John Dunn, two of the receivers aforesaid, and Samuel B. Knapp, as agent of Lewis Brooks, duplicates of which are now in my possession, and copies of which I herewith submit as part of my testimony, marked A and B, and having my signature thereon.—D. Walter Jones.

“Article of agreement made and entered into this 25th of February, A. D. 1842, by and between Paschall Bequette and John Dunn, receivers of the bank of Mineral Point, of the one part, and Lewis Brooks, by Samuel B. Knapp, his agent, of the other part; witnesseth, that whereas there was an arrangement entered into between the said Lewis Brooks and William H. Banks, one of the receivers of the bank

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of Mineral Point, at Rochester, in the State of New York, in the month of October, A. D. 1841, touching certain assets of the Bank of Mineral Point, which said arrangement was partially set aside by said William H. Banks and Paschall Bequette, two of the receivers of the bank of Mineral Point at Mineral Point, Wisconsin, in the month of March, A. D. 1842, by which certain assets of the bank of Mineral Point, were surrendered to the said Brooks, on his payment to the said receivers of a certain amount of the notes or bills of the bank of Mineral Point; and whereas it was left optional with said Brooks to appropriate the proceeds of twenty-nine hundred pigs of lead, in the hands of Augustus Overhill & Co. and eleven internal improvement bonds of the State of Illinois, in the hands of Messrs. Nevins, Townsend & Co. of New York, in exchange for certain certificates of deposit of the Perpetual Insurance Company of St. Louis, Missouri, to correspond in amount with the sum received from the said Lead and State bonds. Now these presents witnesseth,—That the said receivers do surrender unto the said Brooks, the said certificates of deposit, the said twenty-nine hundred pigs of lead, and the said internal improvement bonds of the State of Illinois, to have, hold, use, possess and enjoy, in his own right and for his own benefit, without any recourse whatever, on them the said receivers, or the said bank of Mineral Point, in any shape whatever, and the said receivers agree to execute a release to that effect, so far as affects the twenty-nine hundred pigs of lead: and the said Brooks agrees on his part to pay the said receivers on the signing thereof, the sum of twenty-five hundred (\$2500) dollars, in par funds of the city of Rochester and State of New York, and further to forego all claims that he may have on the said receivers or the said bank of Mineral Point, for any warranty or guaranty given by them or any of them to him at any time whatever, or for any other promise to save him harmless on certain drafts drawn by G. W. & J. Atchison, in favor of Samuel B. Knapp, and endorsed by said Knapp to the said Brooks, and White & Smith; the said receivers on their part, so far as they or the said bank of Mineral Point is concerned, releasing the said Brooks and the said White and Smith, from any liability as endorsers on said drafts. The said Brooks further agrees, and by these presents guaranties, that inasmuch as White & Smith, of St. Louis, being the holders of a package of bank notes of the bank of Mineral Point, and belonging to the said bank of Mineral Point, and which package, containing about nineteen thousand (\$19,000) dollars, said Brooks has ordered said White & Smith, to pay or hand over to the said receivers of the bank of Mineral Point, compliance with which order was refused by White

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& Smith, on the ground of liability as endorsers of said Brooks, on certain drafts drawn by G. W. & J. Atchison,—now the said Brooks stipulates and agrees that he holds himself bound to stand between White & Smith and all liability incurred by them as endorsers for him, and all liability of whatever nature incurred by said White & Smith for him, shielding them fully from all or any payment on such liabilities, and said Brooks pledges himself, that he will truly, *bona fide*, and in good faith, lend all reasonable assistance to said receivers in procuring the delivery of said package of bank notes, and guaranty the receipt by said receivers of said bank notes, so far as his own act may be an obstacle in the way of receiving the same. The said parties hereby ratify and confirm all the parts of the arrangements and settlements made by the said receivers and the said Brooks at Mineral Point, so far as the same do not contravene any of the provisions of these presents, and the said parties do make and design to make, these presents a full and complete settlement of all matters between them of whatever nature. In witness whereof, we have hereunto and to a duplicate of these presents, set our hands the day and year first above written, Paschall Bequette, Jno. Dunn, receivers, M. Point bank, Samuel B. Knapp, agent for E. Brooks.”

“For value received, we do hereby relinquish in favor of Lewis Brooks, and do ratify and confirm to him the transfer made by William H. Banks, acting receiver of the bank of Mineral Point, all our rights and interests to certain certificates of deposit issued by the Perpetual Insurance Company of St. Louis, Missouri, and dated the — day of May, A. D. 184 , amounting to nine thousand two hundred (\$9,200) dollars, and on which suits by attachment have been commenced by Messrs. Jacob Little & Co., of New York, against said Perpetual Insurance Co. of St. Louis, Mo., which suits are now pending in the courts of New York; and we also transfer and assign for value received, all our right and interest in eleven internal improvement bonds of the State of Illinois, heretofore claimed by us, in the hands of Messrs. Nevins, Townsend & Co. of New York; and we do also transfer and assign for value received, all our right and claim to twenty-nine hundred (2,900) pigs of lead, or the proceeds thereof, shipped by G. W. & J. Atchison, to Augustus Overhill & Co., assigned to Samuel B. Knapp, and heretofore claimed by us, the property of the proceeds thereof being now in the court of chancery in the State of New York, hereby completely and irrevocably vesting in said Lewis Brooks all our rights and interests in the premises above transferred and assigned, without any recourse on us or the bank of Mineral Point, in any shape what-

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ever, Paschall Bequette, John Dunn, receivers Mineral Point bank. Mineral Point, Wisconsin, February 25th, 1843."

The plaintiff also read in evidence the following deposition of Paschall Bequette. "I don't know James W. Doughty, the plaintiff. I was one of the receivers appointed by Chief Justice Dunn, to settle the affairs of the Mineral Point bank. I remember being present with another of the receivers, namely, William H. Banks, on or about the 24th September, 1841. David W. Jones was present; we were arranging the affairs of the bank; there were among other bank property, in the possession of William H. Banks, which we as receivers claimed as belonging to the bank, five certificates of deposit for a sum over nine thousand dollars, as well as I can recollect, they were given by the St. Louis Perpetual Insurance Company. I do not recollect the exact amount or number, but to the best of my knowledge and recollection, they were the same certificates described by David W. Jones, in his deposition, which is now taken. On the day in question, Samuel B. Knapp, the cashier of the Mineral Point bank, in the same conversation, claimed the certificates as his private property, which we opposed. William H. Banks, the acting receiver, held the possession of said certificates, as the property of the bank, until some time in October, 1841, when in accordance with the arrangement entered into previously by Banks, (and which was referred to by David W. Jones, in his deposition,) he, William H. Banks, transferred them to Lewis Brooks, uncle to Samuel B. Knapp, since which time I know nothing of them. I never individually held possession of the said certificates, but I am confident that William H. Banks, one of the receivers, had possession of them as the property of the Mineral Point bank, on or about the 24th September, 1841, and they continued in the possession of William H. Banks, until some time in October following—this to the best of my recollection—the transfer by Banks to Brooks was afterwards ratified by the other receivers, I believe."

These depositions were taken in Wisconsin territory, and the garnishee objected to the reading of those parts of them in which mention is made of the appointment of receivers by Chief Justice Dunn, and that portion in which the witness speaks of the contents of the certificates of deposit. These objections were overruled. The garnishee also objected to the reading of the copy of the agreement, annexed to the first deposition, but this objection was not sustained.

Shurlds, a witness introduced on the part of the plaintiff, testified as follows: "That he was the cashier of the Bank of the State of Missouri, and that for a number of years he had been familiar with the course of

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banking business. That he knew Samuel B. Knapp in 1840 & 1841, and that the said Knapp did business with the Bank of Missouri, to some extent previous to 1840, as cashier of the Bank of Mineral Point; that said Bank declining in credit, the Bank of Missouri did no business with that Institution after the year 1840. That the cashier of a bank was the acting officer in making deposits in other banks, when such deposits are made, and in drawing checks or bills for the same. The general custom in banking is to sign the name of the cashier, in making a check, and to make it payable to the order of the cashier, when drawn in favor of another bank, of which he, the payee, is cashier. If a deposit is made by an individual, of course it is payable in his name or according to his direction. It is the custom of the Bank of Missouri, and of banks generally, to keep and enter in the books, the accounts between one bank and another, in the name and style of the bank, and not in the name of the cashier. The printed checks of the Bank of Missouri, for the use of the customers, are addressed to the cashier of the Bank of the State of Missouri, though checks are frequently drawn by persons, addressed to the bank itself, without the word "*cashier*." When certificates of deposit or checks, or bills, are drawn by one bank in favor of another bank, they are usually drawn in the name of the cashier, to the order of the cashier of the other bank, and not in the corporate name of the bank itself. Witness being cross-examined by the counsel for garnishee, testified: The accounts of the Bank of Missouri with other banks, are not kept in the name of the cashier, but in the name of the bank itself, with which it has an account; that he knows of no instance of a check in favor of a bank being drawn, except in favor of the cashier, by name; one of the reasons, probably of this is, and the effect also to enable the cashier to endorse the paper and transfer it, without further authority of the bank or its directors. Checks between one bank and another are generally given to transfer funds, and for the liquidation of balances. Certificates of deposit are not given between banks, for the transfer of funds nor for the liquidation of balances. They generally contain on their face a stipulation for the presentation of the certificate itself, with the order of the person, or the persons, through whom the holder claims to be entitled to payment. I however seldom or never issued any certificates of deposit, nor have I seen any issued by one bank, in favor of the cashier of another bank, for money deposited by the bank. The counsel for the plaintiff asked the witness at the close of the examination in chief, as a matter of skill and professional knowledge, what he would understand to be the meaning of a paper or instrument expressed on its face

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to be payable to S. B. Knapp, cashier, and whether it would be understood to mean that the instrument was payable to S. B. Knapp, in his official, or in his private capacity, or whether it would, as a technical matter, be taken decidedly either way, or might be taken both ways? To which question the counsel for the garnishee objected, and the objection was sustained by the court, and the plaintiff excepted to the decision, and his exception was allowed. On re-examination of witness by plaintiff, witness stated as follows: "In negotiating or settling a balance between banks, I draw a check or bill of exchange in favor of the cashier. I know of few instances of a certificate of deposit being asked for, or given for a deposit made by a bank; it is wholly against the custom of banks."

Loker, a witness for the plaintiff, testified as follows: "In 1841, and some time previous thereto, I was engaged in exchange business in St. Louis. Kentucky notes in the spring of 1841, were from two to three per cent. discount, and they were current, and also the notes of the Bank of Illinois. Currency was then in May, 1841, from 5 to 7 per cent. discount below specie; in November, 1841, current bank notes were *three or four* per cent. discount. Currency consisted then mostly of Illinois, Indiana and Kentucky bank notes.

"I knew S. B. Knapp before the spring of 1841. Mineral Point money began to be discredited in the spring of 1841. He transacted business with me, as *cashier* of the Mineral Point Bank. I am familiar with the custom of banks, in drawing checks, bills and certificates of deposit. Certificates of deposit are generally in the name of the cashier, when made by a bank; they are signed by the cashier or teller in his name as cashier, and when made payable to another bank, they are made payable to the cashier by name, and not to the bank by its corporate name. The cashier of a bank is the acting money officer, and he deposits and checks in his own name, as cashier, the word "*cashier*" being added to his name. I do not recollect an instance where a cashier of a bank made a deposit on his own account, and used the same official style, adding the title of cashier, as when doing it in his official capacity. I was clerk in the exchange office of S. H. Mudge & Co., in the spring of 1841, and S. B. Knapp had some transactions with Mudge & Co. that spring."

On cross-examination witness testified as follows: "I continued the same business, and am still teller in the exchange office of Clark & Brothers in St. Louis, who succeeded Mudge & Co. I never was a clerk, or otherwise employed in a bank. I never saw a certificate of deposit made by one bank in favor of another bank, to my recollection,

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nor a certificate of deposit made by the cashier of one bank to the cashier of another bank. The account was kept in the office of Mudge & Co., in the name of Samuel B. Knapp, cashier; and I do not recollect whether the account was entered in the books in the name of S. B. Knapp, with the full corporate name of the Bank of Mineral Point. When we know the cashier personally, we do not use the full name of the bank, in entering the account in the books, but if the cashier is not personally known, we enter the name of the bank. Mudge & Co. did business with three or four banks. There is no standing rule on the subject of keeping accounts with banks. I do not recollect the names of all the banks we kept an account with. One was the Cairo Bank, and the account was kept in the books, with the name of the cashier, and also the full name of the bank added. I believe another was a bank in Illinois. I do not recollect the other bank. I think the deposits were made and called for by these banks in the name of the cashiers, without the addition of the name of the bank.

The garnishee read in evidence the following sections of an act concerning corporations, taken from the Rev. Laws of Wisconsin Territory:

§ 2. All corporations whose charters shall expire by their own limitation, or shall be annulled by forfeiture or otherwise, shall nevertheless be continued bodies corporate for the term of three years after such limitation or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and to divide their capital stock; but not for the purpose of continuing the business, for which such corporations have been or may be established.

§ 3. When the charter of any corporation shall expire, or be annulled, as provided in the preceding section, the district court of the county in which such corporation may be, on application of any creditor of such corporation, or any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of and for such corporation, to take charge of the estate and effects thereof, and to collect the debts and property due and belonging to the corporation, with power to prosecute and defend in the name of the corporation or otherwise, all such suits as may be necessary or proper for the purposes aforesaid, and to appoint an agent or agents under them, and to do all other acts which might be done by such corporation, if in being, that may be necessary for the final settlement of the unfinished business of the corporation, and the powers of such receivers may be continued beyond the said three years, and as long as the court shall think necessary for the purposes aforesaid.

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§ 4. The said court shall have jurisdiction in chancery of such application, and of all questions arising in the proceedings thereon, and may make such orders, injunctions and decrees thereon, as justice and equity may require.

§ 5. The said receivers shall pay all debts due from the corporation, if the funds in their hands shall be sufficient therefor, and if not they shall distribute the same ratably among all the creditors, who shall prove their debts in the manner that shall be directed by any order or decree of the court for that purpose; and if there shall be any balance remaining after the payment of said debts, the receiver shall distribute and pay the same to and among those who shall be justly entitled thereto, as having been stockholders or members of the corporation, or their legal representatives.

The garnishee asked the following instructions, the first five of which were given, and the remainder refused, to which an exception was taken:

"1st. The issue which the jury is sworn to try, embraces nothing but the naked question, whether the property and funds mentioned in the answer of this garnishee, were or were not the property of the defendant, (the President, Directors and Company of the Bank of Mineral Point,) at the time said garnishee was summoned in this cause, and not before or after that time,

2d. In the trial of this issue the burden of proof lies upon the plaintiff, and unless it has been proved to the satisfaction of the jury, that at the time the garnishee was summoned in this cause the property and funds mentioned in the answer of this garnishee, were the property of the defendant, the jury ought to find the issue for the garnishee.

3d. There is no testimony before the jury, proving or tending to prove any indebtedness of the garnishee to the defendant, or that the garnishee had any property or funds in its possession, belonging to the defendant, except only the testimony touching the certificates of deposit, which have been mentioned in evidence.

4th. As to said certificates of deposit, if the jury believe from the testimony that said certificates were made by this garnishee, in favor of, and delivered to Samuel B. Knapp, (whether with or without the word "cashier" to his name,) and payable to him or his order, the said certificates ought not to be taken by jury as evidence of indebtedness by the garnishee to the defendant, unless it also appear to the satisfaction of the jury, either that the said Knapp did, by endorsement or otherwise, order the contents of said certificates to be paid to said bank,

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or that the funds deposited by said Knapp, and for which said certificates were given, did in fact belong to the said bank.

5th. Unless the jury believe from the testimony that funds deposited by Knapp with the St. Louis Perpetual Insurance Company, and for which the said certificates were given, did in fact, when deposited, belong to the said bank of Mineral Point, they ought to find the issue for the garnishee.

6th. Even if the jury believe from the testimony before them that the said certificates of deposit were the property of the defendant, the bank of Mineral Point, and in possession of said bank, its officers or servants, in the Territory of Wisconsin, where said bank was located, still if they also believe from the testimony that said certificates before the garnishee was summoned in this cause, were transferred to, and came to the possession, and under the charge of receivers or trustees of and for said bank, appointed under the laws of the territory of Wisconsin, to be by them collected, administered and disposed of according to the laws of said territory—then said certificates and the funds therein mentioned, were not subject to attachment in this action, and the issue ought to be found for the garnishee.

7th. If the jury believe from the evidence, that the said certificates of deposit were on their face made payable only at the office of the garnishee, in the city of St. Louis, and payable there in a currency other than lawful money, then this garnishee was not subject to any action, either as garnishee at the suit of this plaintiff, or as defendant at the suit of any holder of said certificates, until the said certificates should be presented at the office where payable, and opportunity afforded this garnishee to redeem the same in currency according to contract."

The plaintiff then asked the following instructions, the first six of which were given, and the remainder refused :

1st. If the jury believe from the evidence that the certificates of deposit, or any of them, mentioned in the answer of the garnishee, were, on the day on which the garnishee was summoned in this cause, the property of the President, Directors and Company of the bank of Mineral Point, the defendant, and were at said time unpaid, they will find that at said time the garnishee was indebted to said defendant, notwithstanding they may also find that said certificates were at said time in possession of receivers appointed by the judicial authorities of the territory of Wisconsin, to be by said receivers held and disposed of according to the laws of Wisconsin.

2d. That the transfer of said certificates by the judicial authorities

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of Wisconsin to receivers there appointed, does not divest the title to said certificates out of the said bank of Mineral Point, so as to defeat the operation of this attachment to hold the garnishee as a debtor of the bank.

3d. That if the jury believe from the evidence that Samuel B. Knapp deposited money or bank notes with the St. Louis Perpetual Insurance Company, before said Insurance Company was summoned as garnishee in this case, and that said Insurance Company issued certificates of deposit therefor, payable in current bank notes or Kentucky bank notes, to the order of Samuel B. Knapp, cashier, and that said deposit was made by said Knapp, not to his own credit as an individual, but in making said deposit he was acting in his official capacity, as cashier of the bank of Mineral Point, and the same said certificates were issued to him in his capacity of cashier, and if the said certificates at the time the said garnishee was summoned, continued to be in the custody and possession of the said bank, its officers or agents, not having been assigned or transferred for a valuable consideration, to any other person by said bank or its authorized agent; in that event the jury should find for the plaintiff, notwithstanding they shall also believe from the evidence, that the money or notes deposited by Knapp, with the said Insurance Company, were not before they were deposited, the property of said bank.

4th. If the jury find for the plaintiff under the first instruction prayed by the plaintiff, the measure of their verdict will be the value of the certificates of deposit in gold and silver, after deducting from their amount such proportions as they believe from the evidence should be deducted to bring them to par with gold and silver.

5th. In the trial of the issue before the jury, the matter of the judgment in the supreme court of New York, is not before them, and cannot properly enter into their consideration.

6th. That whether these funds were the funds of the said bank, or the private funds of Samuel B. Knapp, before they were deposited with this garnishee, if they were deposited to the credit of the cashier of said bank, and not to the credit of Samuel B. Knapp, in his private individual capacity, they thereby became the property of said bank, if they were not before; and if said certificates were in the possession of said bank, her agents or receivers as the property of the bank, at the time this attachment was levied and this garnishee summoned, the jury ought to find for the plaintiff.

7th. If the jury believe from the evidence that said certificates of deposit were the property of said bank of Mineral Point, at the time

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when this garnishee was summoned, or since that time, they are instructed that no subsequent assignment, endorsement, or transfer of them, by said bank, her agents or receivers, to any other person could pass any title to such assignee, so as to defeat this attachment, and that even a payment of them by this garnishee, to such subsequent assignee, could be no discharge of the liability of the garnishee to this plaintiff, and no bar to recovery in this case.

8th. If the jury believe the evidence show the certificates in question to have been the property of the bank aforesaid, on the 24th September, 1841, or between that time and the 1st of October, 1841, they will presume said certificates so to have continued the property of the said bank until the *contrary* is distinctly made to appear from the evidence, and an actual legal and valid and complete transfer is proved.

The garnishee objected to the instructions given to the jury at the instance of the plaintiff.

We have assumed that the last three instructions asked by the plaintiff were refused, although it appears on the record that they were both given and refused. It is the duty of the party appealing to show by the record that error has been committed by the court below. The presumption is in favor of the correctness of the proceedings of that court, and if a record is susceptible of two interpretations, that will be given it which will sustain the judgment of the inferior court.

The jury found a verdict for the plaintiff, and after an unsuccessful motion for a new trial, and in arrest of judgment by the garnishee, judgment was entered on the verdict, from which the garnishee appealed to this court.

That the debt claimed by a plaintiff has been recovered by the process of attachment at the suit of another, has long been held to be a good plea at the common law. 1st Lord Raymond 180; 1st Sal. 291. There is no contrariety of opinion on this subject in relation to debts which are not negotiable, nor as to bills of exchange negotiated after maturity. A difference of opinion is entertained as to bills of exchange or negotiable promissory notes, negotiated before they are due, and it is held by some, that debts evidenced by such securities, are not subject to the process of attachment. Hull vs. Blake, 13th Mass. Rep. 153; Merrian vs. Rundlette, 13th Fick. Rep. 511; Baylies vs. Houghton & Co., 15 Ver. 626. In the case of Scott & Rule vs. Hill & McGunnege, where the maker of a negotiable promissory note, was summoned as a garnishee in a suit against the endorsee, the majority of the court held that the debt could not be subjected to the payment of the plaintiff's demand, unless it was shown that the payee held the se-

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curity at the time the process was served on the garnishee. An innocent holder of a bill of exchange, negotiated before maturity, is entitled to recover, and to shut out almost every equitable defence. This doctrine is founded on the commercial policy of sustaining the credit and circulation of negotiable paper. But as to choses in action or paper not negotiable, the assignee takes it subject to all the defences the maker may have against it before notice of the assignment. To the assignee of choses in action, the rule "*caveat emptor*," applies. With regard to these debts, the doctrine asserted by Justice Story in his Conflict of Laws, § 396, is replete with justice, and secures in a plain way the rights of an assignee against an attaching creditor, and amply protects the garnishee. That doctrine is this: that an assignment operates *per se*, as an equitable transfer of the debt. Notice is indispensable to charge the debtor with the duty of payment to the assignee; so that if without notice he pay the debt to the assignor, or it is recovered by process against him, he will be discharged from the debt. But an arrest or attachment of the debt in his hands by any creditor of the assignor, will not entitle such creditor to a priority of right, if the debtor receive notice of the assignment, *pendente lite*, and in time to avail himself of it, in discharge of the suit against him. Judge Tucker carries the doctrine further, and maintains that if the debtor has notice at any time before payment, he should take steps to prevent the execution of the judgment. 2 Com. 107.

The foregoing is the doctrine of the common law, uninfluenced by statutory regulations. Our statute, relative to the assignment of bonds and notes, provides that the obligor, or maker, shall be allowed every just set-off and discount against the assignee or assignor before assignment. In the case of *Bates vs. Martin*, 3 Mo. Rep. 259, (367) this court held that a payment made to the payee of a note by the maker, after the assignment of the same, and before the maker had any notice of the assignment, is not a good defence to an action by an assignee of the note. Thus it will be seen that our statute alters the common law relative to the effect of an assignment of choses in action, at least where they are evidenced by a bond or note. The effect of this alteration, is to put debts secured by bonds or notes not negotiable, as to their liability to the process of attachment, upon the same footing with those secured by bills of exchange. The assignee of a bond or note not negotiable, is as secure against any defence by the maker which may arise after the assignment, although no notice of the assignment is given, as the *bona fide* holder of a bill of exchange negotiated before maturity. The reason which, in the case of *Scott & Rule*, in-

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duced the court to hold that the attaching creditor must show that a negotiable security was in the hands of the defendant at the time of the service of the attachment, will require us to exact evidence from a plaintiff for the security of a subsequent assignee, that a bond or note not negotiable is in the hands of the payee or assignee, who is defendant in the attachment. The assignee's right is as legal and perfect without any notice of the assignment to the maker, as that of the endorsee of a negotiable security.

Some parts of the depositions were objected to as being incompetent evidence, and exceptions were taken to the reading of the sworn copy of the agreement, the original of which appeared to be in the hands of individuals in the territory of Wisconsin.

The introduction of the sworn copy stands on the same principle, as the proof of the hand writing of a subscribing witness who is beyond the jurisdiction of the court. In the case of *Boone vs. Dyke's legatees*, 3 Mon. 532, parol evidence of the contents of a written partition of slaves was admitted as competent testimony, on the ground that the paper was in the State of Virginia. The same doctrine is sanctioned in the case of *Bailey vs. Johnson*, 9 Cow. 115; *United States vs. Reyburn*, 6 Peters Rep. 352.

The refusal of the court to strike from the deposition that portion of it in which the witness speaks of the appointment of receivers by chief justice Dunn, is not a matter of which the garnishee can complain. Abstracting it from the consideration of the jury, does not affect the plaintiff's right of recovery. When the object of the testimony contained in the depositions is considered, we cannot perceive the force of the garnishee's objection. The plaintiff's design was to show that the certificates of deposit, at the time of the service of the attachment, were in possession of the Mineral Point bank. For this purpose he shows they were in the hands of those who were called trustees or receivers of the company. It is a matter of perfect indifference whether they were rightfully or wrongfully with those agents, and the force of the evidence is not diminished by the admission that they were, without authority, in the hands of the receivers. The evidence shows where the certificates were and who claimed them, and is offered to prove that they belonged to the bank. The legality of the custody of those who held them, neither adds to nor detracts from its weight. As the law of Wisconsin read in evidence, required the appointment of receivers to be made by the district court of the county, if the object of the plaintiff had been to establish a transfer of the certificates to the receivers, the evidence would not have been competent; for as a court

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can only speak by its records, and as the appointment was only authorized by the court and not by the chief justice, it could only be proved by the production of the record. Considered in the light for which it was offered, even had it not been strictly legal, we do not see in what manner the garnishee was prejudiced by it.

The same considerations are applicable to that portion of the deposition objected to, in which the witness speaks of the contents of the certificates. The object of the testimony was not to prove their contents. An inquiry arises, where and in whose possession was a paper at a particular time; on what principle is a witness prevented from describing a paper he saw, in order that a jury may determine whether it was the paper the subject of controversy? If a person is charged with having uttered forged notes, may not a witness describe a note he saw in the possession of the prisoner, in order to show that it was the same that had been uttered?

An opinion has been expressed as to the evidence relative to a transfer of the effects of the Mineral Point bank. But even supposing the evidence sufficient to establish the fact of an assignment, yet it is a principle of our law too firmly established to be shaken, that an assignment under the operation of foreign laws, will not operate to transfer the moveable property of the bankrupt or insolvent in any other country, and thus withdraw it from the process of the local foreign laws, by way of arrest, attachment or otherwise, issued in favor of the foreign creditors, in the country where the moveable property is situate. Story's Conflict of Laws, § 403. The principle here asserted shows that there was no error in overruling the 6th instruction asked by the garnishee.

If the 7th instruction asked by the garnishee and refused by the court, contained a correct legal principle, then it is obvious that no debt, whose existence is evidenced by a written instrument, can be attached in the hands of the maker of the instrument.

The object of the principle established in the case of Scott & Rule, is to prevent a debt from being attached in a suit against a defendant who is not entitled to that debt. The certificates of deposit were payable to the order of S. B. Knapp, Cashier of the Mineral Point Bank. The attachment in this cause was levied on the 24th of November, 1841. It appears that in October, 1841, the certificates were in the hands of Banks, one of the receivers, and that Knapp, although claiming them as his own, was an agent for Brooks, negotiating for them; that they were transferred to Brooks, and by Brooks to Little & Co. Now admitting that Knapp, as agent for Brooks, took them in bad faith and

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under such circumstances as would not have affected the right of the bank, yet if Brooks passed them to Little & Co., who were ignorant of the rights of the bank or its receivers, is not their title better than that of the bank? From the manner in which this transaction has been conducted, is not the bank placed in that situation in which the principle applies, that if one of two innocent men must suffer a loss, it shall be borne by him through whose conduct the loss has been occasioned? The bank by having taken the certificate in the name of Knapp, enabled him to commit a fraud; and if any loss is occasioned thereby, she should bear it. Suppose a debt is owing to A, and he takes a note for it, payable to B, agent for A. If B transfers this note to an innocent person, is not the title of that person better than A's? Is the circumstance that the certificates were payable to Knapp, as Cashier, sufficient to put all persons upon enquiry, and thereby affect them with notice? or is the effect of that circumstance determined by commercial usage, and to be weighed by the jury in ascertaining whether the paper was acquired *mala fide*? This would seem to be a matter for the consideration of a jury, and it will follow that so much of the third instruction, given at the instance of the plaintiff, as directed the jury that a transfer of the certificates could only be effected by the bank or its authorized agent, was not warranted in law.

We will consider at the same time the objections that a foreign corporation is not sueable in our courts, and that a corporation cannot be made a garnishee. The first of these questions does not arise on this record, and if it did it is clear that a garnishee cannot raise the objection. If the court has jurisdiction of the cause, a garnishee on no principle can take advantage of errors against the defendant. If a defendant waives or acquiesces in error committed to his prejudice, who shall be allowed to insist on it for him? The garnishee moved to dismiss the proceedings, on the ground that the defendant was a foreign corporation. That motion was overruled, and no exception was taken. It nowhere appears on the record proper that the defendant is a foreign corporation. How can the question then arise on motion in arrest of judgment? But where is the reciprocity in permitting foreign corporations to sue in our courts, and holding that they in turn cannot be sued in them, in the only mode in which they can be made liable out of the jurisdiction in which they are created? 9 N. H. 394. The Revised Statutes, p. 383, § 26, enacts, that when any subject matter, party or person, is described or referred to by words importing the singular number or masculine gender, several matters, and persons, and females, as well as males and *bodies corporate*, as well as individuals shall be

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deemed to be included. But it is said that a corporation cannot answer an oath. If this objection has any force in it, then a corporation cannot answer in equity; for the 7th sec. of the 2nd art. of the act concerning Practice in Chancery provides, "that every defendant shall answer full all allegations and interrogatories of the complainant, except such as are not required to be answered by reason of exceptions, plea, or demurrer thereto allowed, and the answer shall be verified by oath or affirmation;" and yet the act concerning Corporations recognizes their liability to suits in equity. We must look to principles of law in order to ascertain how their answer is to be verified, and the same principles point to the mode of verifying an answer when made by garnishees.

The exemplification of the record, accompanying the garnishee's answer, which was read in evidence by the plaintiff, could not have been prejudicial to the garnishee. Its influence, if any, was rather hurtful to the plaintiff. The garnishee was entitled to no advantage in this suit, on account of the judgment in New York; and the instruction relative to this record, given at the instance of the plaintiff, was, at most, harmless to the garnishee.

The other judges concurring, the judgment will be reversed.

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The case of Dougal vs. Fryer, 3 Mo. R. 40, affirmed.

1. A provision in a devise restraining the devisees "from using said lot by *selling, encumbering it, or pledging it,*" does not authorize the devisees to make *partition of the lot*.
2. A recital in a will as follows: "wishing and intending as far as in me lies, to place my several children on an equal footing as regards their worldly advancement, at the time of my dissolution, *and forasmuch as my second son and child Henry has been sufficiently provided for and established in the world by the will of his uncle Cyprian Martial Clamorgan, deceased,* and placed in a better situation in a pecuniary point of view than I remain able to place the balance of my children." Held: That although the will of Cyprian Martial Clamorgan was void, and the property devised by him to Henry, was in fact the property of the testatrix in the will above set out, the recital was not a ratification of the devise of Cyprian Martial, nor does it adopt such devise, nor are the heirs of the testatrix estopped from denying the validity of the will of Cyprian M.

Judge SCOTT dissenting on this point.

3. Mere declarations, or a promise upon some contingency to make a deed of affrmance, will not affirm the deed of an infant.

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4. A deed conveying "all the right, title, claim, and interest (of the grantor) both at law and equity, to block No. 25, which property formerly belonged to J. C. and was handed down from him to his children, and willed by his son Cyprian to the said—(grantor)"—only conveys the interest which the grantor had in block 25, under the will of Cyprian; it appearing that the grantor had also an interest in said block derived from his mother, distinct from that under the will.
5. McConnell purchased a lot from C. and had his deed filed for record on the 26th. Lane having purchased the same lot from C., takes a deed, and has it put upon record upon the 27th. McConnell has a new deed made on the 26th, and recorded on the 27th, after the filing of Lane's deed for record. Lane had notice of the first deed to McConnell, but not of the second. Held: that notice of the first deed is no notice of the second. The record is not under our statute notice of a *sale*, but only of the conveyance.
- Qu. Can a deed which has been delivered up by the grantee to the grantor to be cancelled, and has accordingly been cancelled, be afterwards set up by the grantee?

ERROR to St. Louis Circuit Court.

SPALDING & GAMBLE, for Plaintiffs in error.

POINTS.

1st. The limitation in the conveyance of Clamorgan to Brazeau, and Brazeau to the children, did not restrain the children of Clamorgan from making partition before they were *twenty-five* years of age.

The words of the limitation are, that they should not be *able to use the same by selling, pledging, or mortgaging it*, before the youngest should attain the age of *twenty-five* years.

2nd. The will of Cyprian Martial Clamorgan, was made after he was twenty-one years old, and operated to pass the title to the lands described therein, although made before he was twenty-five years old, the said conveyance of Brazeau, not prohibiting such a disposition of his interest.

3rd. But even if the will of said Cyprian did not operate because he was under twenty-five years of age, yet its provision in favor of Henry, having been recognized and ratified by Apauline, the survivor of the three grantees of Brazeau, after she was twenty-five years of age, became thus effectual, and passed to him the title of such portions of the land as Cyprian had devised to him. In other language, the heirs of Apauline are estopped by her recognition and ratification of Cyprian's will in favor of Henry, as fully as if the provisions therein had been incorporated in her own. Sheppard's Touchstone, 413 (29 Law Lib. 259.) If a wife bequeath her goods, and after her death the husband connive at it, or deliver the goods, it makes the will good.

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29 Law Lib. 433; Appendix No. 2. A will though revoked or cancelled, may be revived by republication, and such republication may be by means of another testamentary instrument, or by terms of reference embodying the will.

6th Vesey, 564; Stuart vs. Prujean. That a testamentary deposit of real estate by a paper unattested, but sufficiently referred to, in a will attested by a proper number of witnesses. See close of Romilly's argument and the opinion of the chancellor. 23 Law Lib. 198, (Loveless on Wills 371,) as to republication of Wills.

Greenleaf's Evidence 25 as to estoppel, also page 33 as to admissions that have been acted on, or have been made to influence the conduct of others, which are in nature of estoppels.

3 John. Cases 174, a recital in a will that an estate had been conveyed away, estops the heir.

4th. The first deed of Louis Clamorgan to McConnell having been made the day after he became *twenty-one* years of age, revoked the deed he had made in August of the preceding year to Lane, when he was a minor, and vested in McConnell the title of the land in question; *both deeds being for the same lands.*

As to the revocation see the following: 14 John. Rep. 124; that a conveyance of land by a person after he is of full age, is an avoidance of the deed of the same made by him while a minor; 15 Mass. Rep. 220.

Bingham on Infancy, p. 60, that a *feofment* being a conveyance performed with much greater solemnity than any other, the infant must avoid it by entry; but other conveyances can be avoided without entry. *Ib.* page 62-63.

10 Peters' Reports 59, Tucker *et al.* vs. Moreland. Decision to same effect as in 14th John. 124, and that a confirmation of a deed of an infant after he arrives to full age, must be by *some act of ratification.*

11 John. Reports 542, 11 Serg. & Rowle 311, as to confirmations.

5th. The taking the deed from the Recorder's office did not divest the title of the lot, and cause it to pass from McConnell back to Louis Clamorgan.

2 Henry Blackstone 263-4. Cancelling a deed does not divest the estate. 2nd John. Rep. 84. The cancelling of a deed, with the intent of revesting thereby the title in the grantor, does not produce that effect, and does not destroy the title.

7th Mo. Rep. 337, Moss vs. Anderson, that lands can be conveyed by deed only in this State.

4th Wendell 474. The return or destruction of a deed, cannot re-

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vest the grantor with the title. "A title can be transferred only by deed."

4th Wendell 585. Re-delivery of a deed to the grantor does not re-vest the title in him.

8 Cowen Rep. 71. To the same purport; and the doctrine is discussed, and authorities are reviewed; cites 1st Salk. 120; 1st T. R. 151; Cro. James 399; Coke Littleton 225, note 1366.

1st. J. C. R. 240. If a deed is duly executed, in the first instance, so as to take effect, any subsequent delivery is null and void; the subsequent custody of it by the grantor, will not destroy the effect of the delivery.

9 Mass. Rep. 307, *Hatch et al. vs. Hatch et al.* at page 311-12, the court say "the cancelling of a deed will not divest property, which has once vested, by a transmutation of possession." "A man's title to his estate is not destroyed by the destruction of his deed."

The recorder acted illegally in giving up the *first* deed of McConnell.

Rev. Code 123, sec. 31. This deed was notice to Lane by law, and the proof shows actual notice by his agent.

9 John. Rep. 163; 2 Mass. Rep. 508; 4 Mass. Rep. 638; 7 Mass. Rep. 487; 6 Wendell, 223.

6th. The second deed to McConnell, gave him a title, even if the first did not, having been executed by Louis Clamorgan, and acknowledged and delivered on the 26th July, the day before the second deed to Lane was made, and recorded on the same day that Lane's second deed was recorded, but afterwards. The second deed to McConnell was a mere repetition of the first. It was only another evidence of the same sale, and was, as it were, a continuation of the first deed. It was substituted in its stead, having been filed before the other was withdrawn; so that from the time of first filing of the first deed to McConnell, there had never been a moment when there was not of record a deed to him evidencing the sale. The second deed was not a second sale, or evidence of another bargain. In reason and for all practical purposes, it was the same deed as the first. Suppose the two had been exact duplicates, and McConnell had filed one, and then wishing to examine it at home, had withdrawn it, filing the other to remain there as its representative in its stead, and then returned and again filed the first one.

My position is, the first deed to McConnell having been filed for record, Lane by law had notice of the sale to McConnell, and in fact

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by his agent had actual notice thereof, so that his is to be postponed, to that of McConnell.

As to the matter of estoppel, see Greenleaf's Ev. page 33, and page 24, section 207; p. 244, sec. 210; and p. 246 sec. 212.

The deed to Lane was not confirmed by the parol declarations of Louis Clamorgan, 11 John. 542, 11 Serg. & Rawle, 311; and 10 Peters 59; and Bingham on Infancy, 65.

Fraud cannot deprive Louis from revoking the deed to Lane; 1st John. Cases, 127; and 10 Peters' Rep. 59.

THOMAS T. GANTT, for Defendant in error.

Hardage Lane, by his counsel, submits that the following propositions are maintainable upon the foregoing statement, and the record in this cause, to wit:

1st. That all the interest in the lot and premises in controversy, conveyed to the children of Jacques Clamorgan in 1803, vested in Apauline in severalty by survivorship, upon the death of Cyprian Clamorgan, who died before attaining the age of (25) twenty-five years; 3 Missouri Rep. page 40, Dougal vs. Fryer.

2nd. That it appears clearly from the statements made by Apauline, and her conduct in relation to the matter, particularly from her recitals in the deed to A. Fryer, that she regarded every attempt made by Cyprian M. Clamorgan, to alienate the premises in controversy, as inoperative and void, by reason of his non-age, and that she well knew that all of said premises belonged to her alone.

3d. That at the time of the death of Apauline, she alone had the power of disposing of the premises in controversy, which embraced all of the lot conveyed by the deed to Brazeau in 1803, except so much as had been conveyed by said Apauline to Fryer, as aforesaid; 3d Missouri Dec. 40.

4th. That all the said interest of said Apauline in said premises, vested by her last will and testament in Louis, Louisa, and Cyprian Clamorgan, in equal portions, and that upon the death of Louisa, her interest descended to her three brothers, in equal portions, making the share of Louis four-ninths, (4-9,) that of Cyprian four-ninths, (4-9,) and that of Henry Clamorgan one-ninth, (1-9,) thereof; *and that the premises in controversy were devised by will of Apauline, to Louis, Louisa, and Cyprian Clamorgan, by metes and bounds.*

5th. That all the interest of said Louis was conveyed by him to Dr.

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Lane, by deed dated August 20th, 1840, which said deed was confirmed. *First*, By the conduct and declarations of Louis Clamorgan, on the 24th and 27th July, 1841; 5 Yerger's Rep. 41; 4 Cruise's Dig. Title xxxii, ch. vi. § 9; 1 Inst. 51 b.; also see sec. 10 of same title, chapter & vol. of Cruise's Dig. And, *Second*, By his deed of confirmation to Dr. Lane, dated July 27th, 1841.

6th. That the first deed, or cancelled deed, made by Louis Clamorgan to Murray McConnell, cannot be made a muniment of title to McConnell, or those claiming under him; because, *First*, The said McConnell expressly refused his assent to said deed; in which case no title vests thereby. *Second*, Because said deed contained no words of revocation of the deed to Dr. Lane, and is in fact not inconsistent with said deed. *Third*, Because said cancelled deed was fraudulent and void, by reason of the deception practiced on said Louis by Collins, agent of McConnell, in the phraseology of said deed. *Fourth*, Because the said McConnell, in affirmance of his refusal to receive the said cancelled deed, delivered the same to Louis Clamorgan to be cancelled, and because the same was cancelled accordingly; 4 Cruise's Dig. tit. 32, c. 24, § 18; Sheppard's Touchstone, 70; Hilliard's Abridg. 416; 1st N. H. R. 9; 4th N. H. R. 191; 10 Mass. Rep. 407; 1st Greenleaf 78.

7th. The second deed from Louis Clamorgan to Murray McConnell, cannot operate to the prejudice of Dr. Lane, because before the same was recorded, or any notice thereof, actual or constructive, was given to said Lane, or his agent, the deed of confirmation from said Louis to Dr. Lane was executed and recorded.

8th. That the attempt by McConnell to purchase of Louis Clamorgan the premises in controversy, knowing as he did, from the record, and by actual notice, that Louis Clamorgan had already conveyed his interest therein for a valuable consideration to Dr. Lane, was a fraud in fact, and a fraud in law. 2 Kent's Com. 240; 4 Cruise's Dig. 442; 2 Barn. & Ald. 367.

9th. The conduct and statements of Louis Clamorgan, on the 24th of July, 1841, and afterwards, are sufficient to confirm the deed dated August 20th, 1840, and no re-delivery of the first deed dated August 20th, 1840, could have given such confirmation a higher sanction. 4 Cruise's Dig. 31. As to the first proposition see 5th Yerger's Tennessee Rep., page 41. 2 Kent's Com. 237.

10th. If an infant wishes to rescind a contract of sale or purchase made by him, and *executed* during his minority, he shall, at the time he repudiates such executed contract, return the consideration. Roof vs.

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Stafford, 7 Cowen's Rep., 179. In the case at bar, it is not pretended that the consideration paid by Lane was ever returned by Louis Clamorgan. See also 4 Cruise's Dig. title 32, ch. 6, § 9, § 10; 1 Ins. 50 b, 51 b, 1st Thomas Coke, 177, 2 do. 448.

11th. The representation by Louis Clamorgan himself, that he was of full age, or twenty-one years old, on or before August 20th, 1840, was a fraud in fact by him practiced on Dr. Lane, of which neither himself or those claiming under him shall be allowed to take advantage. 2 Kent's Com. 240; 4 Cruise's Dig. 442; 2 Barn & Ald. 367. Contra 1st Johns. Cases 127:

12th. That the will of Cyprian was absolutely void and incapable of confirmation, as to the premises in controversy, though as to any other realty it might have been valid. 3d Mo. Rep. 40; Sheppard's Touchstone 211, 313; 4 Cruise's Dig. 91; 2 Thomas Coke 416; 6 Cruise's Dig. 14, 15. If upon the facts disclosed by the record and bill of exceptions, the verdict seems to be correct, and can be supported consistently with the rules and principles of law, the judgment of the circuit court will be affirmed.

13th. That the deeds of Charles Collins, as guardian of Louis and Louisa Clamorgan, and Henry Clamorgan, he being appointed to that office by the will of Cyprian, no title passed to the lot in controversy, except such as came to said wards by devise or descent from said Cyprian.

NAPTON, J. delivered the opinion of the court.

At the July term 1842, of the St. Louis circuit court, Hardage Lane filed his petition for the partition of a part of block No. 25, in the city of St. Louis. The lot is described in the petition as follows: Beginning at the south-east corner of block 25, at the intersection of Main and Oak streets, and running thence northwardly along the western edge of Main street, forty-three feet to the south-east corner of a lot of Sylvester Pratte; thence westwardly with the southern line of said Pratte's lot one hundred and ten feet; thence northwardly along the western boundary of said Pratte's lot, eighty six feet, to the northwest corner thereof; thence westwardly and parallel with Oak street one hundred and ninety feet to Second street; thence along the eastern edge of Second street southwardly to the southeast corner of said block, one hundred and twenty feet; thence eastwardly along the northern edge of Oak street, three hundred feet to the beginning. The petition stated that Lane was the owner of two parcels of said land in severalty and

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by virtue of a deed from Louis Clamorgan, was entitled to a portion of the residue. The facts upon which this title is founded, are briefly stated in the petition, and from this statement as well as the evidence submitted in support thereof, appear to be as follows :

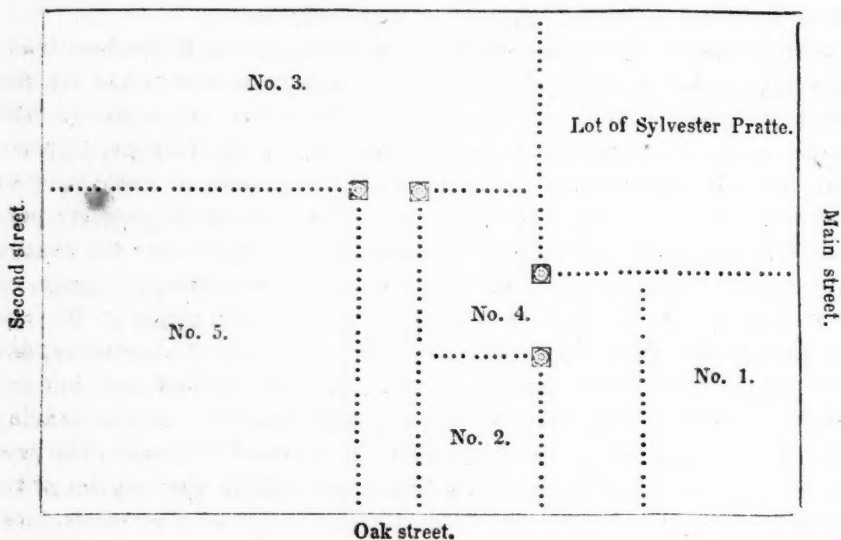
On the 8th of November, 1803, the piece of ground above described, was conveyed by Jaques Clamorgan to Joseph Brazeau, and by the same instrument was, together with sundry slaves, conveyed by said Brazeau, in consideration of natural affection, to St. Eutrope, Cyprian Martial and Apauline Clamorgan, natural children of said Jacques Clamorgan, "that they might dispose of the whole as of property pertaining to them, by full title and legitimately acquired, under the charge and condition of not being able to use the same, by selling, pledging, or mortgaging it before the youngest of the three should attain to the age of twenty-five years complete, at which time they all unanimous, and with one consent, can dispose of said property at their free will and pleasure ; and in case the said boy and girls shall die, without leaving children of their own, the aforesaid lot of slaves shall remain the property of their said father Jacques Clamorgan, and in case any one of the three shall die before the age of twenty-five years, or afterwards, those who remain alive shall be the heirs of him, or her, or them who shall have died, that is, if those deceased have no children, then such children shall be heirs of the deceased father or mother."

St. Eutrope Clamorgan died more than twenty years before the trial without children ; Cyprian died in 1827, without issue ; Jacques Clamorgan died in 1813 or 1814 ; and Apauline died about the 18th April, 1830, being a week after the date of her last will, leaving four children, Louis, Henry, Louisa, and an infant a few days old, named Cyprian, born after her will was made. Louis the eldest son, was born on the 25th of July, 1820 ; Louisa died, without issue, sometime in the year 1834.

On the 15th November, 1826, Cyprian Martial Clamorgan, and Apauline Clamorgan, (St. Eutrope being dead,) made their deed of partition, which was acknowledged by them on the 22d of February, 1827, and was duly recorded in July of said year.

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The following diagram will exhibit the portions allotted to Cyprian and Apauline :



to Cyprian was allotted lots numbered 1, 2 and 3, and to Apauline lots numbered 4 and 5. The deeds contained covenants of quiet enjoyment against the parties, and all claiming under them.

On the 22nd February, 1827, Cyprian Martial Clamorgan made his last will and testament, which was admitted to probate on the 27th May of the same year. In it is the following clause: "Item—I give and bequeath to Henry Clamorgan, now an infant of five or six years of age, who is the second natural son of my natural sister, Apauline Clamorgan, in full right and property, to have and to hold, to him and to his assigns forever, in fee simple, a lot of ground, of which I now stand seized and possessed, situate, lying and being in the city of St. Louis, and is bounded on the east forty-three feet by the first or Main street of said town; on the north seventy-two and a half feet, more or less by a lot of Sylvester Pratte; on the west forty-three feet, by a lot of said Apauline Clamorgan; and on the south by a cross street which separates said lot from the Missouri Hotel, which said lot is situate on block No. 25, in the plat of the city of St. Louis. Item—I give and bequeath in like manner, to the said Henry Clamorgan, and to his heirs and assigns forever, a small stone building, situate on said block No. 25, bounded on the east by the stone house of the said Apauline Clamorgan, seventeen feet, and a small plat of ground attached to said house,

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bounded as follows, to-wit: Bounded on the east by the said stone house of the said Apauline Clamorgan, twenty-nine feet, more or less; on the north by a small lot or square of ground belonging to the said Apauline, thirty-two feet; on the west by a twelve feet alley, twenty-nine feet more or less; on the south by a cross street thirty-two feet, which said cross street separates said lot from the lot whereon stands the stone house called the Missouri Hotel, which said lots are to be leased out," &c. These two lots are numbered *one* and *two* on the plat, and had been allotted to Cyprian in the deed of partition.

By the same will Cyprian devised "in like manner to Louis and Louisa Clamorgan, the infant son and daughter of his said sister Apauline Clamorgan, to have and to hold as tenants in common, and to their heirs and assigns forever, a lot of ground situated in block No. 25, (describing said lot particularly,) which is lot No. 3 in the deed of partition, and directs that if said Louis or Louisa Clamorgan should die before partition of the lot between them, without issue of their bodies, then the survivor should have and enjoy the whole lot in fee simple." No partition was ever made of the lot between Louis and Louisa Clamorgan.

Lot No. 5 was conveyed by Apauline Clamorgan, first to Charles Collins, before she was twenty-five years of age, and afterwards by a deed executed after she was twenty-five, to Alexander Fryer, whose trustees conveyed it to Hardage Lane, who is still the owner. See *Dougal vs. Fryer*, 3 Mo. Rep. 40.

On the 11th April, 1830, Apauline Clamorgan made her will, which was duly admitted to probate on the 12th May, 1830, and recorded in the office of the recorder on the 24th August, 1840. From this will, the following is an extract: "Wishing and intending as far as in me lies, to place my several children on equal footing in a pecuniary point of view, and as regards their wordly advancement, at the time of my dissolution, and forasmuch as my second son and child, Henry, has been sufficiently provided for and established in the world by the will of his uncle Cyprian Martial Clamorgan, deceased, and placed in a better situation in a pecuniary point of view than I remain able to place the balance of my children, therefore I will ordain and require of my executor hereinafter named, so to execute this, my last will and testament, that said Henry shall receive no portion, nor any part of any real estate except as hereinafter mentioned, but shall only be entitled to his equal portion of the proceeds of the personal property which I may leave at the time of my death. Item—1 do hereby give, bequeath and devise to my children in equal proportions, to be equally divided amongst them,

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to-wit: Louis, Louisa, and any and all other children which may hereafter, before my death, be born to me, a certain lot, parcel or piece of land, situate, lying and being in the city of St. Louis, county of St. Louis, State of Missouri, bounded south by a cross street, commonly called Oak street, west by Second, Main or Church street, and north by property now or late the property of Laprise & Pratte, the property hereby and herein bequeathed and devised being all my right, title, interest and property of, in and to a certain larger lot or quantity of land, heretofore, to-wit: On the 8th day of May, in the year of our Lord 1803, by Joseph Brazeau, for and through Jacques Clamorgan, conveyed to St. Eutrope, Cyprien Martial, and the said Apauline Clamorgan, the testatrix, which said lot contained the quantity of one hundred and twenty feet front by three hundred feet in depth, being in block No. 25, on the plat of said city of St. Louis." The testatrix then relinquishes to Fryer a certain mortgage, which he had made her on lot No. 5, and devises and bequeaths to her children, Louis, Henry, and Louisa, and any and all others thereafter to be born to her, and to the survivor or survivors of them, and their heirs and assigns, all the interest and estate which she had in any land, lots or houses within the State of Missouri.

Lot No. 2, being 32 feet on Oak street by 29 feet deep, was conveyed by deed dated 27th August, 1832, to Elijah P. Harris by Charles Collins, guardian of Henry Clamorgan, who was authorized to convey by the St. Louis county court, and afterwards by said Harris to Dunham Spalding, on the 15th August, 1833, and by said Spalding to Charles Collins, by deed dated June 10th, 1834, and all the estate conveyed by D. Spalding to Collins, was vested in John Stacker and Andrew Erwin by sheriff's sale.

Lot No. 4 was sold by the administrator of Apauline Clamorgan by order of court to Louis Clamorgan, and the petition alleges that this was owned in severality by Lane, and there is therefore no question as to this portion of the ground.

On the 20th August, 1840, Louis Clamorgan, then being under 21 years of age, made his deed to Hardage Lane of that date, conveying all his, said Louis' right and estate in the whole piece of land conveyed by Brazeau, being his undivided interest therein, and also his interest in a part in severality. His undivided interest is stated as a third. His deed was recorded on the day of its date.

On the 26th July, 1841, a second deed was made by Louis Clamorgan to Lane, which was acknowledged on the 27th, and recorded on

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that day, at or before 9 o'clock, A. M., reciting the former deed and ratifying and confirming it.

On the 26th July, 1841, Louis Clamorgan made his deed to Murry McConnell, which was acknowledged on the same day, and filed in the recorder's office. By this deed Louis and his wife granted bargained and sold "all his right; title, claim, and interest, both in law and equity, to block No. 25, situate in the city of St. Louis, bounded on the east side by Main street, on the west by Second street, on the north by Cherry, and on the south by Oak street, which property formerly belonged to Jacques Clamorgan, and was handed down from him to his children, and willed by his son Cyprian M. Clamorgan to the said Louis Clamorgan, to have and to hold, &c. &c."

On the 26th July, 1841, a second deed was executed by Louis to McConnell, and on the 27th, Louis' wife joined, and it was recorded on the 27th, after the deed to Lane had been recorded. By this deed, Louis and wife, in consideration of seven thousand dollars, sold all their claim and interest in Block No. 25, (describing it.) The deed to Lane, of August, 1840, is expressly abrogated and disaffirmed, on the ground that he (Louis) was a minor at the date of its execution.

The particular circumstances attending the execution of these three last named deeds, will be found detailed in the testimony of Gantt and Collins, which testimony will be hereafter set out in full.

In July, 1841, McConnell and wife conveyed to January & Dunlap, the western part of Lot No. 3, containing 70 feet front on Second street by 110 deep.

In August, 1832, Charles Collins, guardian of Louis and Louisa Clamorgan, executed his deed to Samuel Gaty, conveying the eastern part of lot No. 3, which is about 78 feet from east to west, and comprehending the whole width of the lot from north to south. This deed was made by virtue of a sale under order of the county court.

T. T. Gantt, a witness on behalf of plaintiff testified that he was employed by Dr. Lane, in August 1840, to examine and report as to the title of Louis Clamorgan to the lot in block 25, which he did. He was then directed to prepare a deed conveying to Dr. Lane the interest of said Louis, which he did, and the deed so prepared was the deed given in evidence, dated August 1840. Before this deed was executed, witness suggested to Dr. Lane, the propriety of making some enquiry into the age of Louis, and Dr. Lane thereupon desired Louis to bring him a transcript from the baptismal registry. Dr. Lane was in the office of witness when Louis brought in a piece of paper, on which was a memorandum to the effect, that Louis had been baptised in July

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1819. The writing was in the upright peculiar hand of a Frenchman. Dr. Lane expressed himself satisfied, and Louis executed the deed either that day or the day after. It was executed on the day of its date. Witness was present when it was executed, and delivered to Louis, Dr. Lane's check on the Gas Light Company, for four thousand one hundred and seventy dollars, and a bond payable on condition for one thousand dollars more, which was the consideration of said deed. The deed was then recorded. Some time afterwards, probably in the spring of 1841, Dr. Lane told witness that he was afraid Louis was not of age when the deed was executed, and desired witness to ascertain whether Louis would ratify the said deed. Witness saw Louis, who said he fully believed he was of age, when the said deed was made, that he still so believed, but that he would make a deed of confirmation to satisfy Dr. Lane, as soon as his next birth day came. His birth day was on the 25th July, 1841. Witness sent for him on the 24th July, 1841, and asked him to execute the deed of confirmation—this was Saturday. Louis said that he was perfectly willing to do so, that the land was Dr. Lane's, who had fairly paid for it, and that he would execute a deed as soon as he was of age. Witness told him that he was of age that day, and handed him a deed of confirmation. Louis read it, and said he wished to be discharged from the covenants contained in the original deed, to convey to Dr. Lane whatever interest in said block he might acquire by inheritance upon the death of his brothers. Witness told him he was not authorized to make such a discharge. An attempt was then made to see Dr. Lane, but he was not at his office. Witness then again urged Louis to execute the deed of confirmation. Louis replied that the land already belonged to Dr. Lane; that he would come in on Monday morning, (26th July) and execute the deed, and then Dr. Lane could discharge him from said covenant. Witness prepared the second deed from Louis to Dr. Lane, which has been referred to, dated July 26th, 1841. Louis did not come to the office of witness on Monday morning. Witness sent several messages to him to his home, but did not find him during the whole of that day. Early on the morning of the 27th, before witness was dressed, Louis came to his office. The chamber of witness adjoined his office. Witness asked Louis why he had not come to execute the deed the day before. Louis replied "*they would not let me.*" Witness asked who he meant by "*they.*" Louis replied, "*Collins, McConnell and them,*" and Louis added, "I have made a deed to McConnell of the title I got from uncle Cyprian." Witness told him that this was very wrong, and that he had no title from his uncle

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Cyprian. He said he knew it was wrong, but that as witness had told him before that he got no title from his uncle Cyprian, he thought he could not hurt Dr. Lane by conveying *that* to McConnell. Witness told him he would go to breakfast, and on his return would take his acknowledgment of the deed of confirmation, and then go to the recorder's office, and determine upon his subsequent course. Immediately after breakfast Louis accompanied witness to a justice of the peace, and acknowledged the deed of confirmation. He then went with witness to the recorder's office. Witness asked for the deed from Louis Clamorgan to Murray McConnell, and one of the clerks handed it to him. Witness read it, and told Louis it was a deed of his *entire* interest in the block—that it was not worth while to put Dr. Lane's deed on record. Louis protested earnestly that it was not so intended, and declared that he had been imposed upon by McConnell, if the deed conveyed any thing but the interest which he, Louis, derived from his uncle Cyprian—but he thought witness must be mistaken as to the effect of this deed, because he said McConnell wanted a quit claim deed of the entire interest of said Louis, but he refused to give it. Witness believing that there was fraud in the affair, resolved to place Dr. Lane's deed on record, and endeavor to avoid the deed which Louis had given to McConnell. Witness then left the recorder's office and returned to his own, and remained there till about three o'clock, when Louis came into it, bringing with him the deed which witness had seen on file in the morning, and saying, "I told you that McConnell wanted a quit claim deed—and I have given him one. He has given this up to be destroyed, and I have brought it to you for that end," or words to that effect. Upon looking at the deed which Louis thus placed in the hands of witness, he (witness) immediately went to the recorder's office, and there found the second deed to McConnell, which has been read in evidence. Witness asked Mr. Lacey how long it had been filed. Mr. Lacey said, "about half an hour." Witness asked Mr. Lacey at what time the deed to Dr. Lane was filed. Mr. Lacey said, "early in the morning." Witness desired him to mark the hour particularly. Lacey said he could say with confidence, it was filed before 9 o'clock, and marked it accordingly at request of witness, and also marked it "1st" to indicate its priority. Witness returned to his office, and on the same day made a memorandum of all the facts here detailed, which he has preserved.

Charles Collins being produced as a witness testified, that some time in the year 1839, he as the agent of Murray McConnell, made an agreement to purchase from said Louis, all his interest in the property

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in question, but it was not carried into effect till 1840; that this trade was made at the solicitation of said Louis himself, the consideration on McConnell's behalf, was a house and lot on Broadway, considered worth seven thousand dollars, and perhaps some money; that property then rented for five hundred and fifty dollars per year, and was made over to said Louis, and he took possession and received the rent; that witness knew that said Louis was not of the age of 21 years, but Louis had been under witness' care and had lived with him, and he had full confidence in his word, and believed that he would fulfil his agreement; said Louis gave his bond to convey his interest as aforesaid, when he became of age; on Monday, the 26th July, 1841, Louis came to witness, who wrote the deed first made to McConnell by him and which has been read in evidence in this case, and said Louis executed, acknowledged and delivered the same, and it was deposited in the recorder's office on the same day, at about ten o'clock in the forenoon; about an hour after said deed was filed for record as aforesaid, said McConnell who lived in Illinois, arrived in St. Louis, and asked witness if the deed had been made and recorded, and witness replied in the affirmative, he then enquired whether Louis' wife had signed, and on being informed that she had not, Louis was sent for and another deed was immediately drawn, which is given in evidence in this suit, and the second made by Louis to McConnell; this last mentioned deed said Louis executed and acknowledged in the afternoon of the same day (the 26th July;) he acknowledged it before justice Hyde, who promised witness that he would go and get the signature and acknowledgment of said Louis' wife, and then file the same deed for record in the recorder's office, before the other deed to McConnell was taken from the recorder's office. That said Hyde took an order from McConnell to exchange the deeds as soon as the last named one should be acknowledged by the wife and filed. The bargain with Louis was, as first made, for the whole of his interest in said property however acquired, and the purchase by McConnell was not confined to Louis' interest under said Cyprian; that witness was McConnell's agent; that Louis took possession of said house on Broadway, several months before he made the deed to McConnell; Louis collected the rent of said house himself; there was no difficulty about the annual rent, and witness told Louis to collect it himself, and he did so. The amount of rent was at first six hundred dollars, then five hundred and fifty, and afterwards lower. That there was no constraint on Louis to obtain the deeds to McConnell, but each of said deeds from him to McConnell, entirely voluntary on the part of Louis, and what he said about con-

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straint or coercion is a fabrication. McConnell was willing to cancel the trade, and witness now thinks he made a very bad bargain for McConnell in the transaction. The said first deed to McConnell was not withdrawn to get the signature of the wife thereto, because McConnell chose that it should remain of record, until another deed was made and executed by her and Louis and recorded, before the first should be withdrawn; that the lot given by McConnell to said Louis was on Broadway; that witness has conversed with the plaintiff since said deeds were made, and Lane said that Louis had deceived him, that he thought Louis of age when he bought—that witness for McConnell proposed to settle their controversy respecting said land, under said deeds of Louis, and said Lane referred him to said Gantt as his agent to settle; saying that any thing he, Gantt, should do in the matter he would approve of; that he then thought the lot on Broadway given by McConnell to Louis worth seven thousand dollars, that he was offered twelve thousand dollars for said lot and another adjacent of same size, and refused it. That the claim of the President and Directors of Public Schools, covers about half of the front of said lot; that he, the witness, formerly owned said lot; thinks it probable that this lot was included in the deed to Stacker & Erwin by McConnell, and if so, that this was put in for McConnell's benefit, to carry out the arrangement of McConnell with Louis; that he did not know when Louis made the sale to Lane; that said Louis was with the witness in his store several years, and left him in the year 1838, and went into business for himself, and had ever since been acting for himself. Louis while with witness, sometimes made out plats for witness, but witness never instructed him how to deal in real estate; that he was under charge of witness from five years old till 1837 or beginning of 1838, when he set up for himself, and had ever since been acting entirely for himself. Louis gave a bond or written contract to McConnell, who approved of it, though it was known he was not of age, but they relied upon his word; this contract was never recorded. Witness mentioned this bond or contract to Rucker who had leased the property and assented to have it for a longer time; that he witness had no notice or knowledge of the sale to Lane by Louis, till long after the said trade with McConnell, and when he first had any knowledge of it, it was mentioned to him by a third person, and he then went and examined the records, and found that it was true. This was before the deed was made to McConnell in 1841. That he witness, has sold all his interest in the lot of thirty-two feet by twenty-nine feet, and has no interest in this suit. The property conveyed to said Louis, is one of the stone houses, situate on Broadway; was part

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of the property sold as mine, under executions held by Stacker & Erwin, at the time all my interest was sold, and it did not satisfy the debt. I made afterwards an arrangement with Stacker & Erwin, by which they transferred all of the property bought at sheriff's sale as aforesaid to Murray McConnell, the stone house aforesaid among the rest, Murray McConnell gave them his notes for the whole of the debt due from me, and executed a deed of trust upon the whole property, the stone house aforesaid inclusive, to secure the payment of those notes. The lot of 29 feet by 32 feet on Oak street, part of the premises involved in this proceeding, was also included in this arrangement with Stacker & Erwin, by which I was to have the balance of the property after the debt to Stacker & Erwin was paid, and that arrangement is still subsisting. The court having asked the witness whether this arrangement with Stacker & Erwin was evidenced by an instrument of writing, the witness answered yes, whereupon the court excluded the above evidence in regard to same, to which exclusion, the plaintiff by counsel excepted."

The testimony of the clerks in the Recorder's office, confirmed the statements of Mr. Gantt, in relation to the time of the filing of the deeds, from Louis to McConnell and to Lane.

The deed from Louis Clamorgan to Murray McConnell, which had been filed for record on the 26th July, 1841, and which was afterwards withdrawn by McConnell and delivered up to Gantt, and by him cancelled, was offered in evidence by the plaintiff in error; but the court refused to permit the said cancelled deed to be read, except for the purpose of showing notice to Lane of the deed substituted for it.

It was admitted that any interest which McConnell may have acquired by any of said deeds, was sold at sheriff's sale to Gaty, McCune & Glasby in July, 1843; and that Henry Clamorgan conveyed all his right to a portion of said lot bounded south by Oak street, west by the lot conveyed by Fryer to Lane, north by the northern boundary of said lot of Lane produced, and east by an alley, to Gaty, McCune & Glasby, in July, 1843.

The plaintiff below, to show that Apauline Clamorgan regarded herself, upon the death of Cyprian, the sole owner of the lot described in the deed to Brazeau, read in evidence her deed to Fryer. In this deed it is recited that Cyprian Clamorgan died before he had any power or authority in any way to dispose of his interest in said lot.

The court, upon motion of Lane, gave the following instructions: "If the jury find from the evidence that Louis Clamorgan, as soon as he arrived at full age, executed a deed for the premises in controversy,

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to Murray McConnell, and afterwards another deed for same premises to Lane, that deed of McConnell was taken to Recorder's office and withdrawn within less than a day, before being copied on the record, (the certificate of filing being erased by the officer) and returned by McConnell to Clamorgan, with the intent of recalling the same and rendering it ineffectual; and that afterwards Lane's deed was filed for record, and that after Lane's deed was so filed, another deed from Louis Clamorgan to McConnell for the same premises and others, (made after Lane's deed, and taken by McConnell from L. Clamorgan at the time Clamorgan's first deed was returned to him as aforesaid) was recorded, that Lane's deed conveys Clamorgan's title unaffected by the prior deed of McConnell, subsequently returned to Clamorgan. If the jury find from the evidence that the agent of Dr. Lane brought his deed to the Recorder's office for record, and there, before recording same, learned that a deed had been made to McConnell, such knowledge doth not impair the conveyance to Lane."

The court also gave the following instructions: "If the jury find from the evidence, that Louis Clamorgan, as soon as he became of age, executed a deed for premises in controversy, to Murray McConnell, and that afterwards on Louis' giving said McConnell another deed for same on other premises, first deed was given up to said Louis, with the intent of recalling the same and rendering the same ineffectual, and that the said deed was only given for the delivery up of the first as aforesaid, said McConnell, and any person claiming under him, is estopped from setting up said first deed.

The court also gave the following instructions at the instance of the defendants: "That the sale and deed by Charles Collins, as guardian of Louis and Louisa Clamorgan, to Samuel Gaty, given in evidence, passed all the title of the said Louis and Louisa, in the portion of the ground embraced therein, to said Gaty: "that the sale and deed of Charles Collins, as guardian of Henry Clamorgan, given in evidence in this case, to Elijah D. Harris, passed all the estate and right of said Henry in the portion of ground embraced in said deed: "that if Gant was the agent of Lane in examining the title, and making the conveyance, and recording the same from Louis Clamorgan to said Lane, of his right in the property in question, then notice of another deed or title from said Louis to said McConnell is notice to Lane."

The defendants asked the following instructions, which were refused: "That the lot of 32 feet by 29 feet, set off to Cyprian M. Clamorgan, in the partition given in evidence between him and Apauline, and in his will given to said Henry, which will, in this respect, is ratified by the

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will of said Apauline given in evidence, was the sole property of said Henry at the time of said sale of the same by Chas Collins, his guardian."

"If the jury believe from the evidence, that Louis Clamorgan sold his interest in said block 25, comprehending the land in question, in 1839 or 1840, to McConnell, while under the age of 21 years, and after he was of the age of 21 carried the same into effect by his deed given in evidence, to McConnell, and that said Lane or his agent had actual notice thereof, when the said second deed to Lane was filed for record, they are bound to find against said Lane's title under that deed."

"If the jury believe from the evidence, that Louis Clamorgan was under the age of *twenty-one* years when he made the first deed given in evidence, to Hardage Lane, and that after he became 21 years of age, and before he executed the second deed given in evidence to said Lane, he made and delivered the first deed given in evidence to McConnell, and the same was recorded, and remained of record till after the second deed to McConnell was made and filed for record, then the title of McConnell to the property in said deed mentioned, is better than that of Lane, so far as said Louis was able to make title."

"That if when Louis Clamorgan's second deed to Lane was recorded, the said Lane or his agent had notice of another prior conveyance made by said Louis, after he was of the age of 21 years, to McConnell, then said Louis's second deed is to be postponed to said McConnell's deed."

"If the jury believe from the evidence, that Louis Clamorgan made his deed to McConnell soon after he came of age, of his interest in the property in question, and that the same was filed for record in the Recorder's office in St. Louis county, and that after the making and filing the same as aforesaid, said Louis made his deed of the same property to Lane, and the same was recorded by Lane's agent, who before and at the time of recording it, had knowledge of the said deed to McConnell, and that afterwards said McConnell filed for record the other deed of said Louis, conveying to him the same property, and carrying into effect the same sale, and at the same time withdrew from the Recorder's office his said first deed, with the intent of cancelling it, the jury are bound to consider the title of said Louis unaffected by said deed to Lane."

That the recital in the will of Apauline Clamorgan, as follows:—
"Wishing and intending, as far as in me lies, to place my several children on equal footing in a pecuniary point of view, and as regards their worldly advancement at the time of my dissolution, and forasmuch as my second son and child Henry has been sufficiently provi-

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ded for and established in the world by the will of his uncle Cyprian Martial Clamorgan, deceased, and placed in a better situation in a pecuniary point of view, than I remain able to place the balance of my children," is a ratification on her part of all the provisions made by the last will of Cyprian Martial Clamorgan in favor of said Henry, in effect makes such provisions in favor of said Henry part of her testamentary disposition, and estops her heirs and all claiming under them from claiming any property limited to Henry Clamorgan, by the last will of Cyprian Martial Clamorgan aforesaid."

The jury found, in substance, that Lane had no interest in so much of said premises as had been sold by Charles Collins, as guardian of Louis and Louisa Clamorgan, to Samuel Gaty: that as to the remainder of the premises sought to be divided, Hardage Lane was seized in fee simple of four-ninths thereof: that the interest of the said Henry Clamorgan had been, until disposed of, one-ninth thereof: that said Henry Clamorgan had conveyed all his interest in and to the lot fronting on Oak street, 29 feet in front by 32 feet deep, to Stacker & Erwin, which interest was one-ninth thereof, and that the remaining parties to the action are not co-tenants or part owners, except as in said verdict is set forth.

A motion for a new trial was made and overruled, and the case is brought here by writ of error.

Most of the points discussed in this case arise out of the instructions given or refused by the circuit court. Some of them will be but briefly noticed, having been, as we conceive, settled by a previous decision of this court. We allude to the case of Dougal vs. Fryer, determined by this court in 1831. That decision, in our opinion, constitutes a sufficient answer to the first three positions assumed in behalf of the validity of Cyprian Clamorgan's will. These positions were, *first*, that the limitation in the deed to Brazeau, fixing the period of majority in the children of Clamorgan at the age of twenty-five, was rendered null and void by the introduction of the common law in 1816, which fixes the period of majority at twenty-one: *secondly*; that admitting the restriction valid, a partition of the land between Cyprian and Apauline was not embraced by the terms of that instrument, which merely prevented the donees "from using the said lot, by *selling, encumbering it, or pledging it*;" and therefore, *thirdly*, that the will of Cyprian, made after he was twenty-one, though before he was twenty-five years of age, was valid.

We are unable to see how the validity of the restriction in the deed to Brazeau, connected as that restriction is with a life estate and cross

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remainders in the three children of Clamorgan, can be reconciled with the assumption of a right to make partition. The effect of such partition must be to destroy the cross remainders, and place it in the power of either party to sell *eo instanti*, the partition is effected. And this would be merely an indirect mode of annulling the restriction. We suppose the provision in the Brazeau deed, which prohibits the children of Clamorgan from selling, encumbering or pledging the lot conveyed, was designed to prevent any *alienation* of it until the period fixed in the deed; and partition, which is a form of alienation, is within the spirit of the restriction. Consistently with the decision in the case of Dougal vs. Fryer that partition cannot be sustained, nor the will of Cyprian which succeeded it. Since this decision, as it appears from this record, several conveyances of different portions of this lot have been made, and upon this state of facts the court does not feel itself at liberty to enter into any examination of the propriety of that decision.

The second general proposition arising on the record before us, relates to the construction of Apauline Clamorgan's will. This will, it is said, either confirms the will of Cyprian, or by implication adopts its provisions; or at all events, it operates as an estoppel, so as to prevent the devisees, under the will of Apauline, from claiming any thing to the prejudice of Henry's claim, under the will of his uncle Cyprian Clamorgan.

The instruction asked on this head, embracing, we presume, the position designed to be taken on this point, is as follows: "The recital in the will of Apauline Clamorgan, as follows: 'wishing and intending as far as in me lies, to place my several children on an equal footing, and forasmuch as my second son and child Henry has been sufficiently provided for, and established in the world by the will of his uncle Cyprian Martial Clamorgan, deceased, and placed in a better situation, in a pecuniary point of view, than I remain able to place the balance of my children,' is a ratification on her part of all the provisions made by the last will of Cyprian M. Clamorgan in favor of said Henry, in effect, makes such provision in favor of said Henry part of the testamentary disposition, and estops her heirs and all claiming under them, from claiming any property limited to Henry Clamorgan aforesaid."

It is not easy to understand what is meant by the term *ratification* in this instruction, if it be designed to advance any other proposition, than that of a devise by *implication*, or estoppel, as maintained in the latter part of the instruction. A ratification of an instrument must be made by the person or power which attempted to create it. The voidable deed of an infant may be confirmed by his act, after he arrives at

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years of legal maturity, but a will can never be merely voidable, for the person who makes it must be out of existence before it can be a will. Upon the death of the testator, his testamentary disposition of his property is either a will, valid and binding upon every one, or it is a nullity, and no subsequent act of any one can revive a nullity. It is true that another may adopt that instrument which purports to be a will, or so embody its provisions, as to make it a part of his own. It then derives its validity solely from the act of the person adopting its provisions; and this brings us to the consideration of the latter branch of the instruction, wherein it is claimed, that the will of Apauline Clamorgan, by implication, adopted the provisions of the will of Cyprian Clamorgan.

If Apauline Clamorgan believed that her son Henry, already had a title, independently of any act of hers, and that belief is to be fairly inferred from the language of this recital, how can it be maintained that she intended to exercise any power of disposition in his favor? Though she may be influenced in the disposition of her property, by this supposition, yet it does not follow that she intends to give to Henry that benefit, to which, she takes it for granted, he is already entitled. How are we to come to the conclusion, that in the event of the failure of Henry's title, under the will of Cyprian, she designed and intended by her will to give him that same estate?

It matters not, in considering the question of intention, whether the testatrix was the owner of the lots attempted to be devised by Cyprian or not. If not the owner, her will, provided the manifestation of intention be clear, would only produce a case of election among those entitled under each will; whereas, upon the other supposition, it would amount to an implied devise of the specific property.

In *Wright vs. Wyvill*, (2 Ven. 56,) a testator bequeathed unto his wife six hundred pounds to be paid to W., saying it was for payment of lands lately purchased of W., *and was already estated as part of a jointure to his wife during her life*. It appeared that these lands had not been settled on the wife. The majority of the judges held that these expressions did not amount to a devise to her, believing that the testator did not intend to devise her anything, upon the ground that he mentioned, that she was estated in it before.

The case of *Dashwood vs. Peyton*, (18 Vesey, 27,) is a deliberate decision of Lord Eldon to the same purpose, and as the case is a leading one on the subject of recitals, we extract the principal facts from the reports. Sir Henry Peyton by his will, reciting that he was entitled for life under the will of his uncle, Sir Thomas Peyton, to the advowson of

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the Rectory of Doddington, with remainders over, "subject to a direction in the said will, that my brother J. Dashwood, shall be presented to said Rectory, when it shall next become vacant, which it is my wish may be complied with; now I hereby declare it to be my desire and earnest wish that in case, upon the vacancy of said living, the said J. D. shall not be then living, or in case the said Rectory shall again become vacant, after the said J. D. shall have been presented to and accepted said presentation," then Algernon Peyton was to be presented.

The fact was, that under the will of Sir Thomas Peyton, J. Dashwood was only entitled to the presentation on a certain contingency, which had not happened. The question then arose, whether the expressions in the will of Sir Henry, raised a gift in him *by implication*, so as to put the persons actually entitled under the will of Sir Thomas, who took benefits under the will of Sir Henry, to their election.

Lord Eldon thought not. "The real question," said he, in an elaborate opinion upon the case, "is, whether this is to be considered as a case of election; and though it cannot be a direct devise, as the testator had nothing to give, it is clear that an effectual gift may be made, by raising a case of election; but for that purpose, a clear intention to give that which is not his property, is always required. If therefore it can be established, that the testator has expressly declared, or has shown a clear intention that James Dashwood should take this presentation, a case of election would be raised; but if upon the whole will taken together, it is obvious, *that the testator thought he had nothing to give to James, that he was already entitled*, and the testator under that supposition, has not given to him, or expressed an intention that he should take, *I find no authority for holding a mere recital, without more to amount to a gift, or demonstration of an intention to give.*"

Here it will be observed, that it was not pretended, that the recital in the will of Sir Henry Peyton, should be construed as a direct devise, because Sir Henry had no interest in the thing devised, but it was urged that the devisees of Sir Henry, who were also devisees of Sir Thomas, should be put to their election. Their right to do this in case the will should be construed as demonstrative of an intention on the part of Sir Henry, to make this disposition of the advowson, was admitted by the Lord Chancellor, and the principle upon which the case turned, was the absence of any indication of *intention* on the part of the testator. In a subsequent argument of this case, after the opinion above alluded to, had been given, the case of *Tilly vs. Tilly* was cited as an authority against the construction which Lord Eldon had given to the will. That case was one,

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where the owner in fee of a trust estate, reciting that his wife was entitled to dower out of that estate, devised it; and the question was, whether that recital amounted to a devise to her of a third part of the rents and profits. The Chancellor, to whom this case was submitted, decreed an account, but with leave for the infant, (who was the devisee,) to move to set it aside, after she became of age, and also declared, that his decree should form no precedent, as he thought it a very hard case. But Lord Eldon disclaimed the doctrine of this case, and disregarded its authority.

The case of *Tilly vs. Tilly*, referred to in the case of *Dashwood vs. Peyton*, involved the same questions we are now considering. The testator, assuming as a fact what had no existence, to wit, the right of his wife to dower in a trust estate, devised that estate. In the principal case *Apauline Clamorgan*, reciting that her son Henry had been provided for by the will of his uncle Cyprian, devised her real estate, or the principal part of it, to her other children. The Chancellor who made the decree in the case of *Tilly vs. Tilly*, protested against its being regarded as a precedent, and Lord Eldon not only disregarded its authority, but intimated his dissatisfaction with the principle upon which it was decided. The case of *Tilly vs. Tilly* is therefore no authority, for the construction now contended for, and the case of *Dashwood vs. Peyton* is an authority pointedly against such a construction. There is a class of cases, in which the testator refers to a disposition as made in his will, (which in fact he has not made,) and the courts have supplied such omission. The ground upon which such implications are admitted is obvious enough. Such recitals manifest an unequivocal intention to make the disposition referred to. See *Powell on Devises*, 197.

So also there is another class of cases, in which a testator has made his will, and afterwards revokes some bequest in it, founding such revocations *on the assumption of a fact which turns out to be false*. In such cases, it is held, that the bequest is not revoked. The case of *Campbell vs. French*, (3 Ves. 321,) is one of this character. The testator, having bequeathed to his grand children, residing in America, £500, by a codicil, revoked the legacies, declaring in such codicil, that they were all dead, and it was proved that they were living. The principle of these cases does not conflict with the doctrine of Lord Eldon in *Dashwood vs. Peyton*, and indeed the case cited (*Campbell vs. French*,) was decided by him. There is an obvious difference between a question of revocation, and the construction of an original will, and the contesting parties bear a different relation to each other.

The case of *Smart vs. Prujean* has been referred to, but its applica-

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bility to the facts of the present case, is not perceived. That a testator may refer to other unattested papers, and make them part of a properly attested will, is indisputable; but in that case there was no question as to the *intention* of the testator, to make certain papers, particularly described, a part of his will, though there was a dispute about the identity of the papers, and the case turned upon that point. The Chancellor was of opinion, that the papers produced, were not such as answered the description in the will. There was no question as to the intention of the testator to make the papers alluded to a part of his will; papers written by himself and addressed to his executors. There was no question in the present case, that Cyprian's will was sufficiently referred to in the will of Apauline, but whether Apauline designed to adopt its provisions by such reference.

The cases of Poulson vs. Wellington, (2 P. Wm. 533,) and Wilson vs. Piggott, (2 Ves. 351,) arose upon the construction of deeds, and illustrate the full extent to which the courts have gone in giving effect to mere recitals.

In Wilson vs. Piggott, a marriage settlement was made, by which, after the death of husband and wife, £4000 was to be paid to all and every, the child and children, other than an only, or eldest son, at such times and in such proportions, as the husband or wife, or the survivor, should appoint by deed or will; for want of such appointment, to be equally divided among such younger children, &c. There were four younger children; the marriage settlement of one of them recited, that she was entitled to £1000, part of this fund; one-fourth was appointed to another, on his marriage; and to a third, one thousand pounds, (£1000,) as her part of that fund. The question was, whether the recital in the marriage settlement, could be considered as a declaration that she was entitled to that sum. The Master of the Rolls thought it clear, that where a party had such a power, as the father in this case had, and demonstrated an intention so give the share to any child, the court would enforce it, without attention to the mode in which it was given. He therefore held that clause in the settlement, to be an appointment.

In Poulson vs. Wellington, (2 P. Wms. 533,) a widow of a freeman of London, who left children, and who died intestate, was entitled to four-ninths of his personal estate, and having by deed assigned over her four-ninths for her separate use in case of marriage, and to such persons as she should appoint, and for want of such appointment, then to her children; the widow, in contemplation of a second marriage, by another deed, to which the intended husband was a party, in considera-

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tion of the intended marriage, and of a settlement made on her by her intended husband, recited, that if she did not dispose of her four-ninths, the husband would be entitled thereto, and then assigned it over to trustees, in trust for the intended husband during their joint lives, subject to her control and disposal by writing, and died without making any disposition. Lord Chancellor King held, that as the husband was a purchaser of the four-ninths, and as it was recited in the last deed, that in case the wife died without making an appointment, the second husband would be entitled thereto, the recital amounted to an informal appointment.

In both these cases, there was much hesitation in making the decrees, and in both, the action of the Chancellor is based upon the assumption of a clear manifestation of intention on the part of the person making the deed. The cases are analogous to those we have heretofore alluded to, in which the testator recites a previous disposition, as having been made in his will, and the recital is admitted to be an informal devise. The party is aware of his rights, and of his power over the subject matter, and supposes that he has exercised that power in that, or another instrument.

Such cases cannot be cited to support the doctrine that a party, who is not aware that he has any interest in the subject matter, or any power over the same, may, by a mere recital that some other person has conveyed or disposed of the subject matter, make such recital his will or deed.

The third branch of the instruction asked of the circuit court, places the validity of Cyprian Clamorgan's will upon the principle, that the devisees of Apauline Clamorgan are *estopped* from denying the title of Henry, under the will of his uncle, Cyprian; that they cannot claim under the will, and at the same time refuse to abide by that portion of it which recognizes Henry's title. This position leaves the question of intention where it was before; it is merely a question between the right of election, and a direct devise, which we have already noticed, in commenting on the case of Dashwood vs. Peyton.

Apart from the considerations to which we have already adverted, the will itself presents some intrinsic obstacles to the construction sought to be placed on it. Apauline Clamorgan, by her will, devises to her three children, Louis, Louisa, and Cyprian, "a certain lot or parcel of land, &c., bounded, south by a cross-street, commonly called Oak street; west, by Second, Main or Church street, &c." Now, lot No. 5, in the diagram had been sold to Fryer, and lot No. 3, by the will of Cyprian, was devised to Henry, so that in truth, no part of her lot, in

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block 25, on the supposition that Cyprian's will was valid, bounded on Second street.

If a controlling influence must be given to the words, "wishing and intending to place all my children upon an equal footing, in a pecuniary point of view," and also to the succeeding recital, in which Henry is said to be provided for by the will of Cyprian, we must adopt the maxim recognized by the civil law, "*Pater credens filium suum esse mortuum alteram instituit haeredem, filio domi, rediunte, hujus institutionis vis nulla.*" But our statute would remedy the hardship of the case put by Cicero, and I have not seen any case in which that principle has been admitted as a principle of the common law. The nearest approach to it will probably be found in the cases of revocations made under a mistake, to which we have heretofore referred.

The third principal point discussed in this case, arises out of the position assumed by the defendant in error, that the deed from Louis Clamorgan to Hardage Lane of August, 1840, was confirmed by the conduct and declarations of Louis on the 24th and 27th July, 1841, and therefore passed all the title of Louis to said lot.

Some diversity of opinion has prevailed in relation to the manner in which the acts of an infant are to be avoided or confirmed, and what acts will amount to such avoidance or confirmation. The whole subject is fully discussed, and the learning on this question apparently exhausted in the opinion of Judge Story, in the case of Tucker vs. Moreland, 10 Peters. In that case the court do not adopt the opinion advanced by Lord Mansfield in Zouch vs. Parsons, that the distinction between void and voidable acts, rests solely upon the solemnity of the instrument, but consider that it depends also upon the character of the instrument, as prejudicial or advantageous to the infant. They hold that in general the deed of an infant is voidable only, by reason of its solemnity, unless it appears on its face to be to his prejudice, in which event it would be void. And this is declared to be the result of the English as well as American authorities. As to what acts will amount to a confirmation, the court held in that case, that where the act of an infant is by matter of record, he must avoid it by some act of record; if an act in *pais*, it may be avoided by an act in *pais* of equal solemnity and notoriety. A confirmation of a deed may be good without being by deed, as in case of a lease by an infant, and his receiving rent after he came of age; but it is very questionable whether a deed could be confirmed by mere words. The acts must be of such a "solemn and unequivocal nature, as to establish a clear intention to confirm the deed, after a full knowledge that it was voida-

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ble. Mere acquiescence, uncoupled with any acts demonstrative of an intent to confirm it, would be insufficient for the purpose."

This doctrine we do not consider inconsistent with the principles asserted by the supreme court of Tennessee, in the case of *Wheaton vs. East*, (5 Yerger 41.) That court held, that a deed was not necessary to confirm that which was executed during infancy, because "that deed passed the interest in the estate, and being only voidable at the election of the infant, should he or his heirs fail to disaffirm, a good title will be vested, and no other person can call it in question, on account of the infancy of the grantor at the time it was executed. Any thing therefore from which his assent after he arrives at age, may be fairly inferred, will be sufficient to affirm the deed made during infancy, and prevent him from afterwards electing to disaffirm it." If these observations be taken in connection with the facts of the case, their propriety will be at once obvious. The infant had permitted his alienee to remain in possession for several years after he became of age, and stood by (without objection) whilst large and valuable improvements were made upon the premises. Such acts would be like the case of an infant lessor, receiving rent from his lessee after he became of full age.

With these principles for a guide, let us see in what light the expressions of Louis, on the 24th July, 1841, (the 25th being his birth day,) are to be regarded, so far as they have any tendency to confirm the deed to Dr. Lane of the preceding August. On that day Louis came to the office of Mr. Gantt, who had sent for him with a view to procure his confirmation of his previous deed, by the execution of another, which Gantt had prepared for that purpose. When asked to execute this deed of confirmation, Louis said he was perfectly willing; that the land was Dr. Lane's, and that he would execute a deed so soon as he was of age, but finally declined executing the deed which had been prepared, because of certain covenants contained therein, and the whole matter was deferred until Monday, (the 26th,) by which time, it was supposed, an interview would be had with Dr. Lane, and another deed prepared, conformably to Louis' views. So far from confirming the deed of August, it would seem that he expressly declined doing so, at that time, and though he used some general expressions that the land was Dr. Lane's, yet such expressions, taken in connexion with his acts, cannot amount to a present confirmation, but only indicate a disposition to confirm at some future time, and on stipulated conditions. From the statements and acts of Dr. Lane's agent, Louis must have inferred that a deed was necessary to a confirmation, and the execution of a deed he deliberately postponed.

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The remaining point to be examined is the propriety of the action of the circuit court, in relation to the deed from Louis Clamorgan to Murray McConnell, filed for record on the 26th July, 1841, and withdrawn and cancelled on the 27th. The court excluded this deed as evidence of title in McConnell.

That a destruction of a deed for things lying in livery, does not destroy the estate which passed, may be regarded as settled law. Greenleaf Ev. 302; Jackson vs. Chase, 2d John Rep. 86. It may be also safely asserted, that in general, secondary evidence of the contents of such instrument, will be admitted upon proof of the fact of such destruction, even though the destruction be voluntary. This latter rule is not, however, of universal application, for cases have occurred, and will doubtless again occur, in which its literal application, unaffected by circumstances, would produce the most monstrous injustice. It is important then, in the present case, to look at the facts and circumstances attending this transaction, with a view to see how far it comes within the general principle, touching the admissibility of secondary evidence.

And first, let us examine the deed itself. This deed passes or purports to pass, "all the right, title, claim and interest, (of Louis Clamorgan,) both at law and equity, to block No. 25, (describing it,) which property formerly belonged to Jacques Clamorgan, and was handed down from him to his children, and willed by his son Cyprian to the said Louis Clamorgan." Does this deed convey any thing, but the interest which Louis derived, or supposed himself to derive from his uncle Cyprian?

The word "*property*" is used indiscriminately to describe the *estate* which a man has in a tract of land, or the *land itself*. If the word in this deed be understood to mean the land itself, that is block No. 25, then the last clause of the description must be rejected. If the word *property* be understood to mean the estate or interest which Louis had in block No. 25, then the whole description is applicable, and the estate derived, or supposed to be derived, from Cyprian, was only conveyed. It is a paramount rule of interpretation to give effect, if it can be done consistently with the manifest intent of the parties, to every part of an instrument. If this cannot be done, then certain rules have been adopted in relation to what parts should first be disregarded; but it is the duty of a court called upon to fix the interpretation of an instrument, first to enquire how every part of the instrument can be made effectual. Applying this rule here, the deed of Louis to McConnell would then be a conveyance of all his right and interest, which was handed down

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from Jacques Clamorgan, and willed by Cyprian Clamorgan to said Louis. Leaving out of view the fact that the will of Cyprian was void, and with a knowledge of the fact that Louis also derived an interest in this block from his mother, distinct from that he supposed himself to derive from his uncle, could any court hesitate to say that such a deed only conveyed the interest derived from Cyprian?

In giving a construction to this deed, as well as determining the right of McConnell to use it in evidence, for the purpose of affecting Lane with notice, the whole character of the transaction must be looked into. An infant may, for such is the law, sell a piece of land for a valuable and *bona fide* consideration to one, and so soon as he arrives at the age which the law fixes as the period of discretion, he may convey the same land to another, and thereby avoid the first deed. This is not considered a fraud on the part of the infant, nor does the party purchasing under such circumstances, and with a full knowledge of them, commit any fraud. The protection designed to be thrown over an infant, would be almost entirely nugatory, if the good or bad faith of the infant were permitted to influence the legal effect of his acts. *Tucker vs. Moreland*, 10 Pet. Rep. The transaction is not, however, favored by a court; if the party purchasing, under such circumstances, gets the legal advantage, he will not be deprived of it; but farther than this, the court is under no obligation to go.

There can be no doubt that McConnell and Collins were fully apprized of Lane's purchase in 1840; the testimony of Collins himself shows this; and there can be as little doubt that no sale had ever been made to McConnell previous to July 26th, 1841. They were fully aware of Louis' infancy, and therefore knew full well that no valid transfer could be made by Louis. It is true that Collins speaks of a previous *bargain*, made on his confidence in Louis' *honor*, but admitting there was such a parol agreement, it is very evident that the only consideration of this bargain on their part, was a house and lot on Broadway, the title to which, if they had any title at all, was not placed under the control of Louis.

The motive attributed to McConnell in withdrawing his deed of the 26th, and delivering it up to be cancelled, is certainly a singular one. McConnell & Collins appear, from this record, as business men, engaged to some extent, too, in the purchase of land or lots—familiar, we may presume, to some degree with even the forms of ordinary conveyances, (for the deed of the 26th was written by Collins,) is it probable that McConnell would think it necessary to procure a transfer of the dower of Louis' wife, that he should have destroyed or cancelled the deed

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which he had from Louis, if that deed was in other respects satisfactory? A comparison of the two deeds is almost conclusive to the contrary. The second deed contains an express revocation of the deed to Lane, and is a clear conveyance of the whole of Louis' interest. The first, to say the least, is of doubtful import, and contains no reference whatever to the previous deed of Lane.

The question then recurs, shall McConnell, after having removed his deeds from the files of the recorder's office, and obliterated all evidence of its ever having been recorded, and delivered up the deed itself to be cancelled, with an intent to divest himself of all title under it, be permitted to claim priority by virtue of a second deed, on the ground of notice of the first? Is an actual notice of the first deed, notice of the second? Our statute makes the deed notice, not of a sale, but of the conveyance. The deed of confirmation to Lane, of July 26th, is not therefore affected by any notice of the first deed to McConnell, and it is not contended that Lane had any notice of the second deed to McConnell, of July 27th.

In relation to McConnell's right to rely upon his cancelled deed, as evidence of title, the obscurity of that instrument was, we think, sufficient under the circumstances, to justify the court in regarding it as no disaffirmance of the previous sale to Lane. An infant, it is conceded, may disavow his contracts, of however solemn a character, made during his infancy, but the act of disaffirmance must be unequivocal. Where the act may be fairly construed consistent with the previous attempt to convey, it should be so construed.

We have already alluded to the question touching McConnell's right to use this deed as evidence, under the facts of this case, supposing it to be an unequivocal disaffirmance of the sale to Lane, and a conveyance of his entire interest in block No. 25. Upon that question the court are not agreed. The cases of *Commonwealth vs. Dudley*, (10 Mass. Rep. 403,) and *Holbrook vs. Tirrill* (9 Pick. Rep. 105,) show the length to which the supreme court of Massachusetts have gone in giving a construction to the rules of evidence, by which the cancellation of a deed is indirectly made to divest the title. The supreme court of New Hampshire, in the case of *Farrar vs. Farrar*, (4 N. H. Rep. 194,) a case somewhat analagous to those in Massachusetts, have perhaps gone still farther. In all of these cases the title is admitted to be unaffected, but the party having voluntarily destroyed the evidence of that title, is not permitted to avail himself of it by secondary evidence.

Upon this point, however, no opinion is intended to be expressed.

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Judge McBRIDE concurring, the judgment is affirmed.

SCOTT, J.—I do not concur in so much of this opinion as maintains that Apauline's will did not confirm the devise made by Cyprian to Henry. The case of Dashwood vs. Peyton, is the case of an election. An election only arises where a testator devises something belonging to another, on the supposition that he has a right to do so, and in the same will gives an estate to him whose property he has devised away. In such a case the devisee cannot claim under the will and against it. He cannot take that which is given to him, and at the same time deny the right of the testator to devise away his property. Here Apauline did not convey away property to which she had no right. Either she or Cyprian had a right to this property. If Cyprian had a right, it passed by his will; if he had no right, then Apauline, by her will, adopted it as if it were her own. Any other construction works the grossest injustice. She declares her intention, by her will, to place her children on an equal footing in a wordly point of view, and yet in despite of this explicit declaration, she is made almost to disinherit one of them. As lands can pass by a will, a previous inoperative disposition of them may be set up by one. See Denn vs. Cornell, 3d Johns. Cases 174.

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1. A vendee may dispute the title of his vendor in an action of ejectment. His possession is adverse to that of his vendor, and he may set up the stat. of limitations, in bar of an action founded on his vendor's title.
2. What constitutes adverse possession is a question of law—the facts to establish that possession are however to be found by the jury.
3. The certificate of the Recorder of Land Titles, is *prima facie* evidence of title, and dispenses with the necessity of proof of the facts upon which the Recorder was required to issue his certificate.
4. A person whose only title is naked possession, cannot defend against the certificate by showing that the facts upon which the Recorder issued the certificate did not exist—or that the requisites of the statute were not complied with.

SCOTT, J. dissenting on this point.

APPEAL from St. Louis Circuit Court.

SPALDING AND TIFFANY, for Appellant.

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POINTS AND AUTHORITIES.

1. The certificate of the Recorder of Land Titles, dated 18th August, 1842, was improperly admitted in evidence, 3 Story's Laws U. States, 1972, act for procuring cultivation, &c., before Recorder D. C. The land in question was not a "lot" in the meaning of act of 13th June, 1812, and was not therefore confirmed by that act; and the Recorder had no jurisdiction of it.

2. The admission in evidence of the testimony taken before Hunt, the recorder, is objectionable for the same reasons.

3. The second instruction asked by defendant below as to the limitation of 20 years, should have been given. *First*, That portion of it relating to the half belonging to the heirs of Dubreuil is correct, for the land was deeded to her husband during the marriage, and by the Spanish law, the wife being the survivor owned the half, *Recopilacion de leyes de Espana*, vol. 3d, page 425, Lib. 10, Tit. IV. Laws 1, 2, 3, 4 and 5; 9 Mart. Rep. 217, (O. S.) 3 Mart. Rep. 97, (O. S.) as to presumptions. *Second*, The deed to the husband Louis Dubreuil, is dated 22 Nov'r, 1790, and the daughter was married in 1797, showing as the rest of the record also does, that they were married long before that conveyance. *Third*, That portion of the instruction as to the children, should have also been given. 1 Edwards' Com. 598, limitation of 20 years; Rev. Code of 1825, p. 510, 511; Rev. Code, p. 392, page 396, sec. 11, 2 Stark. Ev. 506, '7, '8. *Fourth*, Defendant held adversely and denied the right of the heirs of Dubreuil, so that the act would bar even if he were owner jointly with them. 1 Lord Raymond, 310, 311, 312; 5 Burr Rep. 2604; 1 Cowper, 217. Long possession by one tenant in common, held proof of ouster, and a denial of title is *ouster*; 13 John. Rep. 406. A grantee of an undivided ninth who purchased the whole, and entered claiming the whole, holds adversely and is protected by the statute against the other tenants in common. 3. J. R. 116; defendant not protected because he entered under one tenant in common, and therefore possession not adverse. Cowen 530; where tenant in common enters adversely, claiming in severalty, the statute of limitations runs in his favor against his co-tenants. 4 Paige 178, to no effect; 9 John. Rep. 102. Question of adverse possession is certainly for the jury, 9 Cowen 530, Clopp vs. Browagen; though such questions sometimes involve questions of law which the court should decide, submitting the questions of fact to the jury with its instructions, 5 Peters' Rep. 402; 1 Cowen 276, 605; 8 Wend. 440; 1 Littell 260; 2 Peters 212; show that

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possession of part claiming the whole under paper title is sufficient adverse possession of the whole, for statute of limitations to run.

4. The court erred in giving the instruction asked on behalf of the plaintiff below.

First, Because the instruction is ambiguous. It asserts that if the jury believe the facts set forth in the instruction, that the defendant could not dispute the title of Louis Dubreuil. But *Louis Dubreuil* is the plaintiff; and if he be meant by the instruction, the instruction itself is erroneous, as it excludes from the consideration of the jury the derivative title of the plaintiff. *Second*, And the doctrine of the instruction is wrong; 3 Hill's Rep. 516. A grantee in fee may deny that the grantor had any title; 7 Wheat. Rep. 535; (5 Cond. Rep. 335;) 16 Peters' Rep. 25, at pages 53, 54; 2 Marshall's Rep. 27, 28; 4 Littell's Rep. 274; 2 Metcalf Rep. 32. These cases show that the vendee is not estopped from denying the title of his vendor, as he holds adversely to him as well as to the rest of the world.

H. R. GAMBLE, for Appellee.

POINTS AND AUTHORITIES.

1. As to the admission of the certificate of confirmation.

The plaintiff is entitled to give in evidence, in the opening of his case, any title document issuing from any office of the government in the forms of law, unless upon its own face, it appears to be void, as being not within the scope of the officer's powers.

It is only after the defendant has shewn that he claims title and is not a mere trespasser, that he can call in question the regularity of the acts of the officer who gave the document; Hunter vs. Hemphill, 6 Mo. Rep. 106.

The question then for the court is the legal effect of the document after the evidence has been given, and this is to be determined on instructions asked by the party, and is necessarily subsequent to the admission of the document in evidence. So far then as the admissibility of the certificate of confirmation is to be decided upon the facts as they were before the court, when it was offered, there can be no doubt that at the time that question was raised, the court was bound to admit the paper.

If it be said as an objection to its admission, that it bears date after the suit was brought, the answer is ready and conclusive, that it is not an instrument that professes to confer title to the land, but is the evi-

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dence (provided by law,) of the existence of antecedent facts upon which the title rests.

2. As to the admission of the evidence taken by the recorder of land titles, offered for the purpose of shewing that that officer took proof of the possession of the property, under the act of 26th May, 1824, as the basis of the certificate of confirmation, it seems to me that there could be no reasonable objection to the evidence offered, seeing that it was merely a part of the action of the government on the claims, and was admissible on the same principles that required the admission of the certificate of confirmation. I mean of course to confine the question here, as it was confined in the court below, to the admissibility of the paper for the purpose for which it was offered.

3. The instructions asked by plaintiff's counsel and given by the court, was the law which ought to govern the case, and which cuts off all dispute in relation to the title or evidence of title under Sylvester Sarpy. A person entering into the possession of land, claiming under A, cannot dispute the title of A, in a suit brought by B, who also claims under A, nor can he set up an outstanding title in another person as a defence; 10 John. Rep. 292, *Bonne vs. Hinman*; 7 John. Rep. 157; 1 Caine's R. 444; 6 John. R. 34. In this view of the law it is wholly immaterial whether the property was an "out-lot," or a tract of land unconnected with the town, and whether the recorder had power to give a certificate of confirmation or not, and whether in fact there ever was any title in Sylvester Sarpy or not. The possession being obtained under the title of Sarpy, whatever that title may be, must be restored to those in whom that title is vested.

4. The second instruction asked by defendant, and upon the refusal of which the greatest stress is laid, was properly refused.

It assumes as a fact *to be decided by the court*, that the marriage between Louis Dubreuil and Susanna, his wife, took place before the conveyance from Sylvester Sarpy to Dubreuil, and that consequently the property entered into the community which the law establishes when no marriage contract is made.

If the conveyance were made before the marriage, the property would not enter into the community unless bought in by marriage contract, because the community established by law, in the absence of any express contract between the parties, only embraces subsequent acquisitions.

Although the evidence may be strong that the marriage was anterior to the conveyance, yet the question of fact is not to be decided by the court, because the evidence is strong.

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Again, the instruction was correctly refused, because it referred a question of law to the jury.

The court was asked to instruct the jury, "that if they believed that Daujin, and those claiming under him, had possessed the land adversely to the plaintiff, they should find," &c.

What constitutes an adverse possession, is a question of law; 5 Peters 438. The cases are very numerous in which the courts declare what is necessary in law, to constitute an adverse possession; 1 John. Rep. 158; 16 John. R. 301; 3 John. Case 124; 6 Mass. R. 229; 7 Mass. R. 381. These are only a small number of the cases which might be cited, in which the courts decide as a matter of law, what was a disseisin or actual ouster, or adverse possession.

Angell in his treatise on limitations says: "The only rule which can be laid down is, that to constitute a disseisin or adverse holding, there must be an actual and exclusive occupation of the land, accompanied by such circumstances, and attended by such acts, as will amount to a claim to hold it against him who was seized." Angell 81.

I am not discussing what an adverse possession is, but showing that whether certain acts amount to an adverse holding, is a question of law for the court, and is not for the jury. Accordingly the court in examining the authorities referred to by the appellant, will see that in those cases the courts decided what will constitute an adverse possession between tenants in common, and that other facts are required by law to constitute an adverse possession between such tenants than are necessary in other cases.

When adverse possession is relied upon, certain facts are to be ascertained; as, how the possession commenced; what was the purpose of the party taking possession; what were the relations of the parties; what was the intent and evidence of the possession.

In relation to such facts the jury must decide, but the court is to tell the jury what is an available adverse possession.

To illustrate this position: take the case of two tenants in common of a house and lot in town; one enters and uses the whole premises himself without saying or doing any more. This is not in itself an adverse possession; but if he actually ousts his co-tenant, and claims the whole, or does other acts equivalent to an ouster, this it is said will be the beginning of adverse possession. In both cases he has the actual possession of the whole.

To leave to the jury the decision whether there was an adverse possession, without telling them in what it must consist, would be to leave to them a mere question of law.

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The case referred to by the appellant, in 9 John. R. 102, is a case in which the court took to itself the question of fact, and decided it, and has no application to the case now before the court.

5. The first and third instructions asked by appellant and refused, are embraced in the suggestions here made on the instructions asked and given for plaintiff.

NAPTON, J., delivered the opinion of the court.

This was an action of ejectment brought by Dubreuil to recover the undivided moiety of a tract or lot of ground lying in St. Louis county. The suit was commenced on the 26th January, 1839. The plaintiff below obtained a verdict, and judgment was rendered thereon in 1844.

The plaintiff derived his title from the heirs of Louis Dubreuil. In 1785 a concession of the land in dispute was made by Cruzat, the Lieutenant Governor of Upper Louisiana, to Sylvester Sarpy, and in 1790 Sarpy conveyed the land by deed to Louis Dubreuil. Dubreuil died before the change of government, and in 1808 his widow, Susanna Dubreuil, presented her claim before the Board of Commissioners for confirmation, under the 2nd section of the act of Congress of March 3, 1807. The claim was for "four arpens front on the Mississippi, back to the road leading to Prairie Catalan, otherwise Carondelet, and from six to eight arpens in depth." The Board ordered a survey, and in 1812 again considered the claim, but declined confirming it on the ground that there had not been a survey, and the contents of the lot had not been ascertained. In 1818 the tract was surveyed by virtue of a communication from Frederick Bates, Recorder of Land Titles, to William Rector, Surveyor General, which communication included this tract among a list of claims, as to which the general principle of right had been settled by the Board of Commissioners, but not finally confirmed for want of ascertainment of boundaries. In 1824 Theodore Hunt, Recorder of Land Titles, took under consideration the claim, as one which had been confirmed by the act of 13th June, 1812, and received proof as to cultivation, inhabitation and possession, but issued no certificate. In August, 1842, Frederick Conway, then Recorder of Land Titles, issued a certificate which was given in evidence by the plaintiff on the trial. This certificate purported to be issued under the 3d section of the act of March 26, 1824; and it is certified that by virtue of the first section of the act of 13th June, 1812, Sylvester Sarpy's legal representatives were confirmed in their claim to a lot or tract of

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land containing 32 arpens, (describing it) the same having been regularly surveyed in the name of Susanna Dubreuil under said Sarpy. Accompanying this certificate was a plat returned by the surveyor general, and certified by him on the 17th August, 1842. In this certificate the surveyor general says: "This claim is embraced in the registry of confirmations furnished this office by the recorder of land titles, under the provisions of an act of congress of May 26, 1824."

In 1838 proceedings were had for a partition of the land among the heirs of Louis Dubreuil and Susannah Sainton Dubreuil his wife, which resulted in a sale and a purchase by the plaintiff (Louis Dubreuil, the younger) and Louis A. Labeaume.

It appeared in evidence that Louis Dubreuil, the elder, resided on the land in dispute until his death, and his widow occupied it afterwards: that one Daujin bought the land of Madame Dubreuil, and occupied it and claimed it as his own. A witness introduced by the plaintiff, testified that he was told by Antoine Dubreuil, a son of Louis and Susanna Dubreuil, that his mother told him not to molest Mr. Daujin, that she had sold him said land, and had been well paid for it. A witness for the defendant testified, that both Daujin and Madame Dubreuil had told him that Daujin had purchased the land of the said Madame Dubreuil. It was also proved that Daujin claimed the land as his own under the said purchase, and occupied it from about the year 1814 or '15 until his death, when it was sold by his administrator and bought by Louis Menard, who leased it to the plaintiff in error.

Evidence was introduced by the defendant Macklot to show the situation of this tract of land. It lies between the east line of the commons of St. Louis and the river; the said eastern line of the commons cutting off a small corner from the western end of the tract, and is about two miles south of Mill creek, a stream running along the southern part of the old town of St. Louis. There are several tracts lying on the river east of the commons, between the tract in dispute and the old town. The late surveyor general (Milburn) was examined, and gave it as his opinion, that an out boundary line, such as is contemplated by the act of congress of 13th June, 1812, and the act supplementary thereto, could be run so as to embrace every thing required by those acts, and leave out the land in controversy, except so much of it as falls within the St. Louis commons.

The circuit court instructed the jury at the instance of the plaintiff, as follows: "If the jury find from the evidence that the defendant Macklot entered into possession of the land in controversy as the tenant of Menard, and that Menard entered into possession under the claim of

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title from Antoine Daujin, and that Antoine Daujin entered into possession under Susanna Dubreuil, and that Susanna Dubreuil claims the land under the deed given in evidence by the plaintiff from Sylvester Sarpy to Louis Dubreuil, the said defendant cannot dispute the title of Louis Dubreuil."

Several instructions were asked by the defendant, the object of which was to let the jury inquire into the fact, whether the land in dispute was an out lot of St. Louis or not, and also to let in the defence of adverse possession under the statute of limitations. These instructions were refused.

The record presents the single question, whether under the facts of this case, the defendant had a right to dispute the plaintiff's title either by impeaching the validity of the recorder's certificate, or by setting up an adverse possession as a bar under the statute of limitations? In the argument of this question, the proposition contained in the instruction of the circuit court of St. Louis is defended upon two grounds: First, upon the principle of estoppel, and, secondly, upon the ground that the defendant could not, on his naked possession, be permitted to call in question the acts of the recorder of land titles.

The doctrine of estoppel was originally applied to the relation of landlord and tenant, and it has been very properly extended to all cases where a party has obtained possession of land, upon an understanding, express or implied, that he will at some time, or upon some contingency, surrender the possession. Motives of public policy have also excluded a defendant, against whom there has been a judgment and execution, from defeating the purchaser's recovery of possession, by setting up an outstanding title. *Jackson v. Bush*, 10 John R. 223; *Jackson v. Hinman*, 16; *Ib.* 292. So where there has been a sale but no conveyance, the party taking possession under a bond for title, cannot set up an outstanding title to defeat the vendor; 2 Marsh. 242.

The relation of vendor and vendee is different. The latter owes no fealty to the former, nor is there any principle of public policy which should prevent the vendee from strengthening his title. He holds adversely to the vendor as well as all the world.

The case of *Blight's lessee v. Rochester*, (7 Whea. 535,) is a leading case on this subject. The facts of that case were very similar, in many respects, to the present. James Dunlap was an alien, who came to this country subsequent to the treaty of 1783, and died before the signing of the treaty in 1794. After his death, one Hunter, professing to have purchased of John Dunlap, the brother of James, entered the land in controversy, and sold to the defendant Rochester.

Clamorgan, et al. vs. Lane.

The plaintiffs were the heirs of John Dunlap. The court held, that if the defendant claimed under a sale from Dunlap, then the plaintiffs asserted a title against this contract, unless they could show that it was conditional, and that the condition was broken, they could not, the court emphatically observed, in the very act of disregarding the contract themselves, insist that the defendants were bound in good faith to acknowledge a title which had no real existence.

Notwithstanding this case went up to the supreme court from Kentucky, the court did not regard the decisions of the courts of that State, which seemed to countenance a different doctrine, as sufficiently satisfactory and pointed, to impose upon them the duty of extending the obligations created by the relation of landlord and tenant, to that existing between vendor and vendee. This case was afterwards recognized, and its principles adopted, in the subsequent cases of *Society for the propagation, &c. v. Town of Pawlet*, 4 Peters, 506; *Jackson ex dem. Bradstreet v. Huntington*, 5 Peters, 402; *Willison v. Watkins*, 3 Peters, 43; and *Watkins v. Holman and others*, 16 Peters, 25.

The case of *Osterhaut v. Shoemaker* was decided by the supreme court of New York in 1842. The language of the court in that case was very explicit, and they deny the applicability of the doctrine which prevents the tenant from disputing the title of his landlord, to a grantee in fee. The latter, as the court in the case, say, does not receive the possession under any contract express or implied, that he will ever give it up. He takes the land to hold for himself, and to dispose of at his pleasure. He owes no faith or allegiance to the grantor, and he does him no wrong when he treats him as an utter stranger to the title.

The same doctrine is held by the supreme court of Massachusetts, in the case of *Barker v. Salmon*, 2 Metcalf R. 32.

The supreme court of Kentucky have taken a distinction between cases where a conveyance has been made by the vendor to the vendee, and cases where there has been a sale but no conveyance. In the former class of cases they recognize the right of the vendee to dispute the title of the vendor as an adverse holder; (*Voorhees v. White's heirs*, 2 Marsh, 27; *Winlock v. Hardy*, 4 Litt. R. 274,) but where there has been no conveyance they deny the right. The case of *Conelly's heirs v. Childs*, is one in which the latter proposition seems to be maintained, though the report of that case is so meagre, that it cannot be ascertained upon what precise state of facts the opinion of the court was based. It would appear, however, from the statement made by the judge who delivered the opinion, that the defendants obtained posses-

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sion from one Hays, who had given them a bond for a conveyance, but none had been executed; under these circumstances it was held, that the defendants could not avail themselves of an outstanding title in a stranger, to defeat the recovery of the plaintiff. It does not appear whether there was any obligation implied by the contract between the vendor and vendee, that the vendee should deliver up the possession in any contingency, nor whether the vendor acted in conformity with his contract in asserting his title. In *Voorhees v. White's heirs*, the court said, that so long as the defendant held by bond under the plaintiff, *and looked to him for a consummation of his right*, he could not controvert the plaintiff's title; but that when a deed was obtained in pursuance of such bond, the defendant could with propriety be said to hold adversely to his vendor, as well as the rest of the world, and had the same right to controvert his title as any other person. This opinion, we think, places the doctrine on a reasonable, and legal basis; and the question then resolves itself into one of adverse possession; and the question of adverse possession cannot be determined by the execution or non-execution of a conveyance. This would be a circumstance which would have its weight, but it might be outweighed by others, and the intention of the parties must be gathered from all the circumstances attending the transaction. It is obvious then, that no general rule could be laid down, governing all cases, or any class of cases, but each case must depend upon the facts proved, conducing to show the actual intent of the parties.

To apply these principles to the present case, the doctrine of the circuit court that the mere fact, that Daujin acquired possession from Madame Dubreuil precludes Daujin and those holding under him from disputing the title of Madame Dubreuil, or rather her husband's, is not sustained by the authorities. It would depend, as we think we have shown, upon the character of Daujin's possession, and of that we will speak hereafter.

Independently of the doctrine of estoppel, the defendant relies, for the exclusion of the particular defence set up in this case, upon the principle that a mere trespasser should not be allowed to question the plaintiff's title, where that title is derived from the government, and is *prima facie* good—the defendant himself not pretending to have obtained any title whatever from the government. This position was in a qualified form, taken by this court in the case of *Hunter v. Hemphill*, 6 Mo. R. 106, and the same principle is subsequently asserted in the case of *Sarpy vs. Papin*, 7 Ib. 503. The doctrine is, however, not a new one, or peculiar to this court, although it unquestionably derives

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much force from the phraseology of our statute regulating the action of ejectment. It may seem to conflict with that legal truism, that the plaintiff in ejectment must recover upon the strength of his own title, and not because of the weakness of his adversary's; but this principle which has acquired the force of a maxim, will be found upon examination to be subject to such a variety of exceptions, as greatly to diminish its importance as a general principle in the action of ejectment. We have already adverted to several cases, in considering the first branch of this general proposition, in which the character of the defendant's title alone was held to preclude all investigation into that of the plaintiff. Such is the case, where the relation of landlord and tenant exists, and such is the case between vendor and vendee, where the possession of the latter is not adverse to the title of the former. A purchase under an execution is another exception, the defendant in the execution, and those claiming under him, being prohibited, by the most obvious dictates of public policy, from showing that the title thus acquired at the sale is defeasible. So also in the case of mortgages, the mortgagor is not allowed to set up the title of a third person against his mortgagee. *Doe vs. Pegge*, 1 Term R. 758. The case of *Knox & others vs. Jenks*, 7 Mass. R. 488, presents another instance of the numerous exceptions to this general maxim, which more nearly resembles in several features the case now under consideration. There, the court held, that where land was sold by an administrator duly authorized to sell, strangers to the title, those having no estate or privity of estate or interest affected by the sale in question, should not be permitted to set up the title of the heirs, or call on the executor or administrator for strict proof of the regularity of his proceedings. The provisions of the law affecting such sales, were thought to be designed for the protection of persons connected with the estate conveyed, and such persons and those claiming under them, were therefore allowed to see that every essential requisite of the law should be complied with. But strangers to the title were not considered as entitled to any such privilege. The case of *Hunter vs. Hemphill* asserts the same principle, and nothing more. It was conceded in that case, that the defendant might show that the paper title of the plaintiff was a mere nullity, because issued by an officer not authorized by law, or because of the reservation of the land from sale. But where the defendant claims no title himself under the United States, the courts will not indulge him in looking very critically into the plaintiff's title, with a view to show that irregularities have been committed by the officers to whom the government has entrusted the power of selling their lands.

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When the case of Janis' administrator vs. Gurno, was first before the court, (4 M. R. 458,) Judge McGirk said, "The act of Assembly provides that the action of ejectment may be maintained upon a confirmation made under the laws of the United States, against one in possession, who has not a better title thereto. What shall be considered a better title, the act does not define. It surely does not mean that the bare possession of the defendant shall be so considered. We understand then, that the meaning of the act is, that when the plaintiff produces a confirmation of the land to himself, he has made out his case, and will be entitled to recover, unless the defendant can show a better title. What in all cases, or indeed in any given case, would be a better title, need not now be decided."

When this case was up a second time, the defendant showed that the lot in controversy was confirmed by the act of 1812, to the heirs of one Toussant Lebeau, and deduced title from a portion of these heirs. The defence was admitted and sustained. The court observed, that the common law doctrine, which allowed the defendant to prove an outstanding title in a third person, was not repealed by our statute, because, (as they say,) where the plaintiff shows no right of recovery, it is clear he has no right to eject the defendant from his possession, he being entitled to that possession against all the world except the right owner.

This is true, and the idea that a plaintiff who has no title whatever, or who produces a void patent, or a void confirmation, can recover the possession from a mere trespasser, finds no support in any thing advanced by this court in the case of Hunter vs. Hemphill. But it does not follow that therefore a mere superior outstanding title in a third person, with whom the defendant has no privity, can be given in evidence in an ejectment to defeat a *subsisting* possessory title in the plaintiff which is superior to that of defendant.

The case put by Judge McGirk, in illustration of the general doctrine of setting up an outstanding title, is a case which the plaintiff has no title, the patent under which he holds being absolutely void. "Suppose a plaintiff on the trial," says the Judge, "in any case proves his title by a patent of any given date, and then the defendant will show, that one or ten years before the plaintiff's right accrued, a patent was made to a third person for the same land. In such a case, it is quite clear that the defendant has no right to the property, but it is equally clear that the plaintiff has no right to recover, because he has no title." Such also would be the case, if the plaintiff has disposed of his title.

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The plaintiff must show a *subsisting* title, and a title at least *prima facie* valid.

By the act of 1824, the recorder of land titles was authorized to investigate the titles of claimants to village lots, out-lots, &c. in St. Louis and other enumerated villages, and when satisfactory proof was made to him of the occupancy, cultivation, &c., required by the act, he was directed to issue a certificate of confirmation to the proprietor. Whether the certificates should have been regarded of any value, in case of a disputed title, after the court had decided that the act of 1812, *proprio vigore* confirmed the lots, is no longer a debateable question. It has been repeatedly decided that they are *prima facie* evidence of title, and shall prevail against any one not having a better title.

Is the bare possession a better title? If not, upon what principle shall the mere trespasser be permitted to require the holder of the register's certificate, to prove his possession, cultivation, &c? For it is obvious, that if this be permitted, the holder of the certificate may in every instance be required to make the same proof which he should have made to the recorder. Of what avail then is the certificate? How can it be said to be *prima facie* evidence? How can it prevail against a person not having a better title? Bare possession is the lowest order of title; and if the certificate of itself will not prevail against the naked occupant, it is of no value. The holder of the certificate must in every instance prove up his possession, cultivation, and inhabitation prior to the 10th March, 1804, and the certificate is no better than waste paper, for by making such proof, he makes out his title under the act of 1812, without the aid of any certificate. To give any operation then to our statute regulating the action of ejectment, which declares that a confirmation by the recorder of land titles, is sufficient to maintain the action against any person, not having a better title, it must follow that the defendant who has no title other than that which mere possession gives, cannot defend against the holder of a certificate of confirmation, by showing that the inhabitation, cultivation, &c., required by the act of 1812, did not exist, and that the recorder erred in declaring that they did exist, in issuing his certificate of confirmation.

If it be conceded that a defendant shall not be allowed to go behind the certificate, with a view to show that the inhabitation and cultivation prior to 1804, required by the act of 1812, did not exist, and that the requisites of the statute in this respect were not complied with, upon what principle will he be permitted to show that the lot confirmed does not come within the terms of the grant, as being neither a town or village lot, or out-lot, or common field lot? Both questions were alike

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referred by the act of 1824, to the judgment of the recorder. That officer passed upon both, when he issued his certificate. The one requisite is as essential to the validity of the grant as the other. If the lot confirmed had not in fact been cultivated and possessed prior to the 10th March, 1804, the recorder had no authority for issuing his certificate; or if the requisite cultivation and possession were proved, but the lot was not appendant to the village, the claimant had no right to a certificate. When the certificate has issued, it is *prima facie* evidence that these facts did not exist, and neither the one or the other can be questioned by a party who has only that title, which mere possession gives.

We think therefore that the circuit court was correct in excluding from the consideration of the jury all evidence introduced for the purpose of showing that the tract of land in controversy was not an outlot of the town of St. Louis, not upon the principle of estoppel, but because the defendant had that character of title, which did not authorize him to go behind the certificate of the recorder.

Adverse possession under the statute of limitations was unquestionably a bar to the plaintiff's right of action, if proved to the satisfaction of the jury. The proof was that Daujin and his representatives had had possession for upwards of twenty years. Where one is in possession of land, holding for himself, to the exclusion of all others, the possession so held is adverse, whatever relation in point of interest or privity he may sustain towards others. Whether a party in possession holds that possession for himself or for another, is a question depending upon evidence to be determined by the jury.

We are unable to see the necessity of determining the rights of Madame Dubreuil and her children. If a tenancy in common was created by the death of Louis Dubreuil the elder, so that Madame Dubreuil was the owner of one half, and her children of the other half of the land in controversy, it seems to be well settled that a grantee of one tenant in common for the whole land, entering on such conveyance, may set up the statute against his cotenants in common. The *quo animo* with which the disseisin is effected, is the only enquiry. And though ouster is the customary proof to sustain a disseisin by one tenant in common of another, it is not the only evidence; for in the case of Pawlet vs. Clark, (4 Peters R. 504) the court intimated that a possession may be adverse where an ouster may be presumed; and in Blight's lessee vs. Rochester, the possession was held adverse, where any presumption of ouster was repelled by the very circumstances of the case. In Bradstreet vs. Huntington, the court declared that ad-

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verse possession, when it actually exists, may be set up against any title whatever, either to make out a title under the act of limitations, or to show the nullity of a conveyance executed by one out of possession.

As to an entry under a void title, if it be supposed that the sale from Mrs. Dubreuil to Daujin was a nullity, it must be observed that the bar of the statute originates in wrong.

The question of adverse possession should then, we think, have been left to the jury. It is the province of the court to tell the jury what constitutes an adverse possession, and the jury must determine from the evidence whether such facts exist, as in the opinion of the court, constitute such adverse possession. The instruction asked upon this point in the circuit court has been objected to, and the objections are probably such as may well have justified the circuit court in declining to give it in that form. The merits of the controversy, however, as we think, depend upon the question of adverse possession, and as that question was never submitted to the jury, the judgment will be reversed and the cause remanded.

Judge McBRIDE concurring.

SCOTT, Judge.

The majority of the court in the case of Hunter vs. Hemphill, expressly hold that a person in possession may show that the title of a plaintiff who seeks to dispossess him is void. The act of 26th May, 1824, authorized the recorder to inquire into the fact of inhabitation, cultivation or possession, and the boundaries and extent of each claim. Whether a lot was a village lot or not, was a question not submitted to his determination, and his certificate is no evidence of that fact. If he confirmed a lot or parcel of land not belonging to one of the enumerated towns or villages, his act was void, and the case of Hunter vs. Hemphill, is an authority to show, that a party standing on his naked possession may establish the nullity of the act by which an attempt is made to dispossess him: *ex nihil, nihil fit*, is as true in law as it is in physics. Suppose the recorder had issued a certificate of confirmation for a lot forty miles west of St. Louis, would any one maintain that his act was valid? If it is void in that case, would it not be equally void if it is one hundred yards beyond the limits of the town?

"Why hold the word of promise to the ear, and break it to the hope?" Why hold that the nullity of an act may furnish a protection against consequences, and at the same time maintain that nothing will avoid it?

Field vs. Milburn.

I hold that in all actions of ejectment, the plaintiff must recover on the strength of his own title, and not on the weakness of his adversary's, and that a defendant in ejectment, may set up an outstanding title in a third person in all cases, except he is a tenant defending against his landlord, or has gone into possession under a contract for a purchase, or is in, under a defendant, whose land has been sold under execution, or such like cases. The judgment must, in my opinion, be reversed.

FIELD vs. MILBURN.

1. An execution is placed in the hands of a constable; after it is received by the constable, but before it is levied, an attachment is issued, and levied by the sheriff upon the goods of the defendant in the execution: held, that the attachment will hold against the execution.
2. Where there are two executions against the same defendant, the lien of the executions, as between the execution creditors, attaches from the *levy*, and not from the time at which they went into the hands of the officer.

ERROR to St. Louis Circuit Court.

FIELD, *pro se*.

The only question involved in the case is understood to be, whether the delay of the constable to levy the execution in favor of Field, had the effect to postpone it to the attachment?

And it is insisted, that no delay of the officer not procured or directed by the party, can have the effect to deprive the latter of his lien; 5 Cowen, 390; 12 Wend. 405; 4 Rawle, 376; 5 Watts, 302.

Nor can it make any difference that the party has passively acquiesced in the delay—see the cases cited above—particularly when, as in the present case, the execution at the time of the attachment had still a long time to run.

And it is conceived that the policy of the law in enlarging the term of justices' executions, was to secure to debtors the very indulgence on the part of officers, which is complained of by the attaching creditor.

A HAMILTON, for Defendant.

1. This is not the ordinary case of settling priorities, nor one which

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authorizes a court to interfere summarily. The parties should be left to litigate their rights by suit; 4 Cowen, 461.

2. No surplus is shown beyond what was necessary to satisfy the attachments, and the party has his remedy against the officer for his neglect to levy within a reasonable time, and in permitting the defendant in the execution to sell and dispose of his property to an amount indefinitely beyond what would have satisfied the debt to be collected; 9 Mo. 41.

3. Here is a contest between creditors claiming under process issuing from different jurisdictions. The maxim of *vigilantibus non dormientibus legis subvenient*, applies; Payne vs. Drew, 4 East. 538, cited in 9 Mo. 134; 19 Wend. 495; Devereaux & Beatty's N. C. Rep. 456.

McBRIDE, J., delivered the opinion of the court.

On the 24th November, 1844, Field recovered judgment before a justice of the peace of St. Louis township against John Berlin for the sum of one hundred and fifty dollars; debt and costs. On the 27th November execution issued on this judgment, which was on the same day delivered to the constable of St. Louis township to be executed. Berlin was at the time a merchant, owning a stock of goods and carrying on his business, and so continued selling at an average of thirty dollars per day, with the knowledge of the plaintiff and the constable, up to the 21st January, 1845, when attachments were issued out of the office of the circuit court of St. Louis county, at the suit of other creditors; and on these writs all of Berlin's property was attached. Shortly afterwards orders of sale were made by the circuit court, and the property was sold by the sheriff, Milburn. On the 25th February the constable returned on the execution in favor of Field, "No goods except in the hands of the sheriff, which he refuses to relinquish."

On the 25th of February, Field filed his motion in the circuit court, asking for an order on the sheriff to pay over to him, out of the proceeds of the sale of Berlin's property, the amount of his execution against Berlin, returned by the constable as above. The sheriff objected to the court entertaining the motion, but the court overruled his objection and proceeded to hear the same, and after the hearing overruled the motion of Field, to which opinion of the court Field excepted, and has brought his case here by writ of error.

The principal question involved in the case is, whether the delay of the constable to levy the execution in his hands in favor of Field, had the effect to postpone it to the attachments.

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For the sheriff, it was contended in the circuit court, and has been relied upon here, that this not being an ordinary case of settling priorities, the court was not authorized to interfere summarily, but that the parties should be left to litigate their rights by suit. For this principle we are referred to 4 Cowen, 461, where it is said that the supreme court will not interfere summarily, and direct how money levied on execution by a constable or other person, *not their own officer*, shall be applied.

It would appear scarcely necessary for the court to make such an avowal, inasmuch as the power of a court in such matters has never been supposed to extend beyond its own officers. They are presumed to act under the immediate control and coercion of the court; and hence the court have always claimed and exercised the power of compelling them to discharge their duties toward all parties interested, and that too in a summary manner. The sheriff having money in his hands, made by virtue of the process of the circuit court, holds it subject to the order of the court, and may be required to pay it over to the party ascertained by the court to be entitled thereto. And it is not necessary that the individual making application to the court for the exercise of its power, should be a party in the process emanating from the court.

The execution of Field in the hands of the constable of St. Louis was prior in date and delivery to the attachment in the hands of the sheriff of St. Louis, but the latter were executed first, and it is therefore urged that the constable having failed to execute the process in his hands, when he might have done so without any hinderance from the sheriff, he has become liable to an action at the suit of Field. The constable may by unnecessary delay in the execution of process, lay himself liable to the plaintiff in the action; but the fact of the constable being liable to an action, by no means determines the right of the plaintiff to pursue his remedy against the property of the defendant in the execution. There is no propriety for divesting the plaintiff in an execution of any of his legal rights against his debtor, because of the *laches* of the officer, unless he has in some way superinduced it.

The facts in this case do not impeach the conduct of the plaintiff. He sued out his execution, and placed it in the hands of the proper officer in due time; and the fact that the defendant, Berlin, had ample means out of which the plaintiff could make his debt, rendered it unnecessary that any special diligence should be used, or attention given by the plaintiff to the subject. The execution had still a considerable time to run when the attachments were levied.

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Having disposed of the two preliminary questions raised by the counsel for the sheriff, we will proceed to inquire whether the failure of the constable to levy the execution of Field until after the levy made by the sheriff under the attachments, had the effect of postponing or defeating the lien of the execution. And here some difficulty presents itself, growing out of the conflict of authority on the subject. The common law doctrine appears to be well settled, that a *fieri facias* bound the goods of the defendant from its *teste*; that is, the writ bound the goods as against the defendant himself and all claiming by assignment from him; so that a *bona fide* sale, except in market overt, did not protect them from a *fieri facias* tested before, although not issued or delivered to the sheriff until after the sale; Cro. Eliz. 174; Cro. Ja. 451. The general property in the goods remains, however, in the defendant, subject to the lien, and is not affected until an actual levy by the officer, who thereby acquires a special property; Yelverton, 44. But if the goods whilst in the possession of the defendant, and before the levy of the *fieri facias*, are seized by virtue of a junior writ and sold, the purchaser acquires a good title free from the prior lien; 4 East. 540; 1 Ld. Ray, 252; 1 Salk. 320. In this case no question is raised, nor can any doubt exist as to the validity of the titles acquired by the purchasers under the attachment sale made by the sheriff. The plaintiff in the execution recognizes the validity of the sale, and asked the circuit court to direct its officer, who still had the proceeds of the sale in his hands, to pay over to him an amount sufficient to satisfy his execution against defendant Berlin. This application is based upon the supposed preference which he has in consequence of his prior lien. It becomes then necessary to inquire into the object and character of liens springing up under executions. By our statute the lien on the goods and chattels of the defendant, attaches from and after the delivery of the writ to the proper officer to be executed; Sess. Acts, 1838-39. Is this statutory lien different in its objects from the common law lien? If it is not, then we are at no loss to ascertain its purpose. It was intended to prevent the defendant from alienating his estate, and thereby defeating the plaintiff, and not for the purpose of creating priorities between judgment or execution creditors. The general property being in the defendant, and each execution creditor having a lien, the law does not interfere to divest from the most vigilant the advantage which he has obtained, by having first obtained an actual levy of his execution upon the goods of the defendant. By a leading case on this subject, *Payne vs. Drew*, 4 East. 545, it was held, "that where there are several authorities equally competent to bind the goods of the party

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when executed by the proper officer, that they should be considered as effectually and for all purposes bound by the authority which first actually attaches upon them in point of execution, and under which an execution shall have been first executed." The correctness of this principle has been recognized by the supreme court of North Carolina, in the case of Jones vs. Judkins, 3 Devereaux & Beatty's R. 456. Also by the court of appeals in Kentucky, who say, in Kibby vs. Higgin, 3 J. J. Mar. 212, "As between execution creditors, it is not the date of the execution nor of its delivery to the officer, but the date of the levy which gives priority of lien," and refer to the case of Tabb vs. Harris, 4 Bibb, 29, and the authorities there cited. The court proceed to say, "We not only admit the authority of these cases, but approve them as rational and just. The only object of attaching a lien to an execution, is to prevent the debtor from defeating the creditor by alienating or embarrassing his estate. The reason of the law in such a case does not apply to a competition between execution creditors, and *cessante ratione cessat lex.*" Moreover, it is but sheer justice to give the preference to the creditor, who, by his superior industry and vigilance, shall have procured the first levy on the debtor's estate."

In the case now before us, there were two writs in the hands of different officers, equally competent to bind the goods of the defendant we must therefore award the spoils to him who had his writ first executed.

The foregoing view of the subject commends itself to our favor, as it will tend greatly to prevent that species of favoritism and fraud practiced frequently by favorite creditors, who cover and protect the property of their debtor against other creditors, by keeping alive the older execution.

The cases in the New York Reports, to which reference was made by the plaintiff in the execution, and which appear to conflict with the cases above referred to, are not in our estimation sufficient to overturn the principles settled in the cases referred to in this decision, and which appear to us to be founded on sound principles of equity.

Judge NAPTON concurring, the judgment of the circuit court is affirmed.

Sudge SCOTT dissenting.

Higgins vs. Breen, Adm'r of B. McNally.

ROSALINA HIGGINS vs. PETER BREEN, ADM'R OF B. McNALLY.

1. This was an action of assumpsit brought by Rosalina Higgins against the administrator of McNally's estate, and contained two counts. The first was a special count, averring that the deceased McNally, representing himself to be a widower, had induced the plaintiff to marry him—that she did accordingly marry, and live with him until his death. It alledged that at the time of the marriage, McNally had a wife living, unknown to the plaintiff, and that said wife survived McNally, and is entitled to dower in his estate, "*by which the plaintiff was deprived of her dower.*" Held, that this count was bad.

Where the marriage is void and not merely voidable, the wife is not entitled to dower.

2. The second count was for work and labor generally. Under this count evidence was offered to prove the marriage and other facts contained in the first count, and that plaintiff labored for deceased, and managed his household affairs. Held, that the evidence ought to have been received.
3. The right of action for the work and labor done under this fraud of the deceased, survives against the administrator.
4. Where a verdict is rendered, and no motion to set it aside is made, the supreme court will not interfere.

ERROR to St. Louis Court of Common Pleas.

Scott, J., delivered the opinion of the court.

This was an action of assumpsit, brought by the plaintiff in error, Rosalina Higgins, against the administrator of Bernard McNally's estate.

The declaration contained two counts. The first was a special one, setting out at length the facts of the case, and alledging, that B. McNally in his lifetime, representing himself to be a widower, sole and unmarried, solicited the plaintiff to marry him, and as his wife to take charge and control of his family and domestic concerns, in consideration of which she should enjoy all the rights, interests and privileges of a married woman. That the plaintiff afterwards married McNally, and lived and cohabited with him as his wife, took charge of his affairs, and conducted herself as a dutiful wife, until the death of the said McNally. It is furthermore alleged that at the time of the said marriage, the said McNally was married and had a wife living, unknown to the plaintiff, in foreign parts, which said wife survived said McNally, and is entitled to dower in his estate; that McNally left a considerable estate, and by reason of the premises the plaintiff has been, and is debarred of her dower to the damage, &c.

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The second count is general, for work and labor, care, diligence and attention to the business and affairs of McNally, the defendant.

To the first count in the declaration there was a demurrer which was sustained by the court below. On the trial of the issue on the second count, the plaintiff offered to prove that the deceased, Bernard McNally, about the month of August, 1841, applied to the plaintiff to marry him, then representing himself as a widower, with two children, and stating that his former wife was dead, and after repeated solicitations the plaintiff consented to marry the said Bernard. On the 23d day of August, 1841, the plaintiff and said Bernard were married. The plaintiff also offered to prove that she lived with said Bernard, as his wife, from the time of their marriage until his death, which occurred on the second day of October, 1842, discharging all the duties of a wife, managing the family and household affairs of said McNally, with prudence and industry; that said McNally was a farmer, in the possession of a comfortable house, and a farm of about forty acres in cultivation, which he owned, near Manchester, in St. Louis county, with considerable personal property; that McNally had many laborers in his employment on his farm, and in erecting buildings, and the plaintiff cooked for the whole family, including those laborers. The plaintiff further offered to prove that said Bernard McNally, at the time of making the representations to plaintiff as aforesaid, and at the time of his marriage with the plaintiff as aforesaid, and at the time of the death of the said McNally, had a lawful wife living in foreign parts, who has, since his death, come to the State of Missouri, and claimed and obtained dower in his estate; and that the plaintiff has been cut off from any interest or share in the estate of said deceased, and that she never received from McNally, in his life time, nor from any person since, any compensation for the services she rendered, more than her food and clothing. The bill of exceptions then states that the court decided that the proof of the foregoing facts would not support the plaintiff's action, and that she was not entitled to recover, and the plaintiff not offering any other evidence, the court instructed the jury to find for the defendant, to which opinions and instructions the plaintiff excepted, and the exceptions were saved. There was a verdict for the defendant. No motion was made to set aside the verdict, and grant a new trial, but the cause is brought here on the exceptions taken before the verdict was given.

At common law, actions *ex contractu* alone survived against an executor or administrator. But where the cause of action arise from any mis-feasance or mal-feasance, was a tort, or arose *ex delicto*, in which the declaration imputes a wrong done to the person or property of an-

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other, and in which the plea was not guilty, and damages were covered, then the rule *actio personalis moritur cum persona* prevailed, and no action could be sustained by or against an executor or administrator. The statute of 4th Edward the Third, *de bonis asportatis in vita testatoris*, reciting that in times past executors have not had actions for trespasses done to their testators, as of the goods and chattels of their testator carried away in his life time, and so as such trespasses have remained unpunished, enacts that the executor in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had if they were living. This statute was subsequently extended to executors of executors, and to administrators, and being a remedial statute has been always liberally construed, and although using the word trespasses alone, has been extended to all acts by which personal property has been lessened in value. It has been construed as extending to an action for an escape, to debt on a judgment, suggesting a *devastavit* by the executor, to an action for a false return, for removing goods taken on execution before the landlord was paid a year's rent, and for not setting out tithes. The statute, it will be perceived, only gave actions *to* executors, and not *against* them, for as against the person committing the injury the action dies with him. Chitty 59; 1st Saunders 217. Our statute has changed the English law in this respect, and has given an action both *to* and *against* executors and administrators, and by employing much broader language than the statute of Edward, seems to have included by express enactment the injuries which were comprehended in that statute only by construction. The words of our statute are, "for wrongs done to the property, rights or interests of another," &c., with an exception of actions for slander, libel, assault and battery, or false imprisonment, and to actions on the case for injuries to the person. Rev. Code, title administration, art. 2, sec. 24 and 25.

For the wrong complained of by the plaintiff in her declaration, had a *scienter* been alledged, an action on the case could have been maintained at common law against the wrong doer. Buller 32. There is no room for the doubt expressed by Buller, whether an action for the injury would lie, inasmuch as it was made a felony by statute, and therefore the civil remedy was merged in the crime, for our code expressly declares that in no case shall the right of action of any party injured by the commission of a felony, be deemed or adjudged to be merged in such felony. Rev. Code 215; Nash vs. Prim, 1 Mo. Rep. 125; Mann vs. Trabue, ib. 508.

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Our statute giving an action in all cases *against* an executor or administrator, where, by the English law, it is given only to the executor or administrator, it will be perceived at once that many actions which by the English law, die with the person committing the injury, will under our law survive against his executor or administrator; and therefore the principle of the common law that where the plea must be, that the testator or intestate was not guilty, no action can lie against the executor or administrator, does not obtain in our jurisprudence.

It may be objected that notwithstanding the language of our statute is broader than that of Edward III, and although the common law rule, defining what actions survived, and what did not, is broken down, yet actions for injuries to the person are expressly excepted in our law, and deceits are classed among wrongs to the person. 1 Sanders 217, in the matter of Sir Henry Sherrington, Justice Manwood said, in every instance where any price or value is set upon the thing on which the offence is committed, if the defendant die, his executor shall be chargeable; but when the action is for damages only, in satisfaction of the injury done, then his executor shall not be liable. Lord Mansfield, in the case of Hambly vs. Trott, 1st Cowper 376, in delivering the opinion of the court, after citing the words above mentioned of Justice Manwood, remarks: "Here is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself, at the expense of the sufferer, as beating or imprisoning a man, then the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But, where besides the crime, property is acquired, which benefits the testator, then an action for the value of the property shall survive against the executor. So far as the tort goes, an executor shall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable, *but as far as the act of the defendant is beneficial to him*, his assets ought to be answerable, and his executor therefore shall be charged. In another part of the same case, the judge declares that if a man receives the property of another, his fortune ought to answer it. Suppose he dies, are his assets to be in no respects liable? It will require a good deal of consideration before we decide that there is no remedy. He further maintains that *where there is gain or acquisition of the testator, by the work and labor, or property*, an action will survive against his representative."

This view of the question, taken from the case above referred to, which was twice argued, and unanimously concurred in by the court of

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King's Bench, after great deliberation, commends itself by its precision and clearness, and finds a hearty concurrence in the sense of justice of every impartial mind.

If the injury of McNally was a mere tort, which resulted in no benefit to himself, then according to the case above cited, the action would not survive; but if it can be shewn that the injury resulted in an advantage to him, that he was made richer, or his circumstances improved by the work and labor of the unfortunate plaintiff, then this action will lie. It is not maintained that for the deceit practised, for the injury to her person, the plaintiff has any redress against the administrator, or that she is entitled to any *premium pudicitie*, she is only allowed the value of her work and labor, which were performed under such circumstances, as the law will imply a promise to pay for them; and as if the action had been brought against the defendant himself, he would not have been permitted to give evidence of his having committed a wrong in order to defeat it, so such a defence will not be allowed to his administrator.

Whether the services of the plaintiff were valuable, whether the defendant's wealth was augmented by her assistance, or whether she was a burden, are not questions for this court; their determination belongs to a jury; it is enough for us that the case in the attitude in which it is brought here, assumes that her services were valuable.

We are of the opinion that the demurrer to the first count of the declaration was properly sustained. No authority has been produced in which a *feme sole*, under the circumstances of this case, has recovered the value of her dower in the estate of her wrong doer. Had it been allowed, such recoveries must have been frequent, as divorces have often been granted to women for cause which render the marriage null and void, *ab initio*. But dower does not attach, by virtue of any contract, express or implied, made by the husband to the wife; it is a consequence of marriage, and is a provision made by law for the sustenance of the widow, and the nurture and education of her children.

There must be a marriage before dower can attach, and where the marriage is void, and not merely voidable, there can be no dower.

A point has been made touching the manner in which the errors complained of, are brought before the court, and whether the judgment must not be affirmed, although on the merits, the cause is for the plaintiff? However painful such a course must be to the court, yet its rules of practice, long established, cannot be overturned or departed from, unless a conviction arises that they are unjust or improper. It has been settled for many years, that when there is a judgment on a verdict, and

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no motion is made to set aside the verdict and grant a new trial in the court below, this court will not disturb the judgment of the inferior court, for errors committed in the progress of a trial, although they were excepted to, unless a motion is afterwards made to set aside the verdict for those errors, and the motion is overruled. This rule, although harsh in its application in particular cases, and somewhat so in the present, is founded in good policy, and on solid reasons, and we do not feel ourselves at liberty to depart from it. *Montgomery vs. Farrar*, 2 Mo. R. 189.

Judgment affirmed.

NAPTON, J., I do not concur in the affirmance of this judgment. I have not been able to find any authority which requires a point of law to be twice decided by the circuit court, in order to authorize this court to review that decision. The case of *Montgomery vs. Farrar* was a case in which this court refused to reverse the judgment of the circuit court, because of the insufficiency of the evidence, on the ground that there was no motion for a new trial. Whether the erroneous charge will avail the party excepting in this court, is another question. Undoubtedly unless the party complaining has preserved the evidence to show the practical effect of the instruction, it cannot be determined whether he has sustained any injury by the decision. In this case no question of this character arises. The instruction given by the court was in the nature of a demurrer to the evidence, and as the instruction was excepted to, and the whole evidence preserved, I am unable to see the necessity of a motion for a new trial, by the refusal of which the circuit court would only have decided the same question a second time.

 STEAMBOAT REVEILLE vs. CALVIN CASE.

1. Under the statute of 1835, regulating proceedings against boats it is not necessary that the complaint should follow the words of the statute.
2. A demurrer assigning special causes, is to be regarded as a special demurrer, although it may contain a general assignment.
3. Where by a rule of the St. Louis circuit court leave to plead is refused upon overruling a special demurrer, the sup. court will not interfere with a judgment entered up by the circuit court upon overruling such a demurrer. It is a matter of practice to be regulated by the discretion of the circuit court.

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4. When a judgment upon demurrer is entered for the plaintiff, the plaintiff's cause of action is admitted as stated in his pleading, and the only matter for the jury on an enquiry is to ascertain the amount of damages.

APPEAL from St. Louis Circuit Court.

McBRIDE, J., delivered the opinion of the court.

Case instituted proceedings on the 6th Nov'r. 1843, under the statute of 1835, R. C. 102. against the steamboat Reveille, by filing in the office of the clerk of the St. Louis circuit court, the following complaint:

"Calvin Case of St. Louis, by his attorney, complains of steamboat called the Reveille, used in navigating the waters of this State, that heretofore, to wit, on the first day of July last past, and within six months from the time of making this complaint, at St. Louis, in the county of St. Louis, the complainant sold and delivered unto Foster & Pickering owners of said steamboat Reveille, one steamboat boiler, for the use of said steamboat Reveille, at the price of \$250, of which \$150 were paid to the complainant in hand.

"And the complainant further says, that said boiler was placed on said steamboat Reveille, and used in the employment of said boat to the present time; and the balance of said sum of \$250, was to be paid to the complainant in ninety days from the time of such sale and delivery aforesaid. And although the time of payment has long since elapsed, yet the said \$100, being the balance of \$250, has not been paid to the complainant and is now justly due, wherefore he prays that said boat may be arrested agreeably to the statute," &c.

The plaintiff made oath to the truth of the facts set out in his complaint, and that the cause of action had accrued within six months last past.

The boat having been arrested, the owner came forward and executed bond as the statute required, obtained the release of the boat, entered his appearance to the action, and filed a demurrer to the complaint, setting out the following causes:

1. "For that the said plaintiff in and by his said complainant, sets out a supposed indebtedness contracted by certain persons alleged therein to be the owners of said boat, whereas it is apparent from the particulars of said demand, that no supply or supplies, within the true meaning of the statute in such case made and provided, were had.
2. For that it does not appear in and by said complaint, that the

said boiler was furnished for the use, and on account of the said boat, within the true intent and meaning of the statute.

3. For that it does not appear in and by the said complaint, that the said boiler was furnished in and about the building, repairing, fitting out, or furnishing and equipping the said boat, within the true intent and meaning of the statute, or that the same became permanently part and parcel of the said boat.

4. For that the said complaint sets forth a supposed cause of action, as being within the second class of liens specified in the said act, whereas it is apparent that the said cause of action, if any the plaintiff have, is within the third class of liens.

5. For that the said complaint does not set forth the particulars of the said demand, with sufficient certainty and distinctness, to determine its true classification within the statute.

6. And also because the said complaint shews no cause of action against the said boat, and is in other respects uncertain, informal and insufficient," &c.

The court overruled the demurrer, and entered a judgment of default against the defendant; and awarded a writ of enquiry for the assessment of damages, to be executed at the same term. Upon the overruling of the demurrer, the defendant asked leave of the court to plead to the merits of the action, which the court refused as being contrary to the 18th rule of the code of rules of said court in force, that is to say—"In all cases of special demurrers to a declaration, petition or complaint, no leave to plead will be given to the defendant, if the demurrer shall be overruled."

To the refusal of the court to permit him to plead, the defendant filed his exceptions.

Upon the assessment of damages, the defendant moved the court for two instructions, the first having been refused, it is only necessary to notice, and is as follows: "The jury are instructed, that if they shall find from the evidence, that any articles or article for which the plaintiff claims damages, was sold and delivered by him to the owners of the steamboat Reveille, at a time more than six months before the commencement of this suit, they will in their assessment of damages, exclude the value or price of any such article or articles."

The court at the same time charged the jury, "That the defendant by suffering judgment by default, had admitted the plaintiff's right of action, and that the only thing for the jury to determine was the extent for which the plaintiff was entitled to recover for the boiler specified in his complaint." To the refusal of the court to give the first instruc-

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tion asked for, and to the giving of the charge by the court to the jury, the defendant excepted.

The jury assessed the damages to \$106 25, whereupon the defendant moved to set the assessment aside, for the usual reasons, which being likewise overruled, he excepted and appealed to this court.

The first question presented for the decision of this court, is the action of the circuit court on the demurrer.

The supplemental act of 1839, § 1, page 13, provides that, "There shall be a lien on every boat or vessel used in navigating the waters of this State, in the following cases: 1st. For all wages due to the hands or persons employed on board of the same on account of work done or services rendered on board of such boat or vessel. 2d. For all debts contracted by the master, owner, agent, or consignee of such boat or vessel, on account of stores and supplies furnished for the use thereof. 3d. For all materials furnished and labor done by mechanics, tradesmen and others in the building, repairing, fitting out, furnishing and equipping such boat or vessel," &c.

Boats and vessels are equally liable for debts contracted by the master, &c. on account of the labor done, materials furnished, &c. for the building, &c. of such boat or vessel, as for supplies furnished for the use thereof.

The complaint alleges the sale and delivery of the boiler, to the owners of the steamboat *Reveille*, *for the use of said boat*, and that the boiler was placed on the boat and used in the employment thereof, to the time of bringing the action. Although the draftsman has not used the precise phraseology employed in the statute, yet we think the language used definite enough to satisfy the statute. The exact nicety which the defendant insists upon, is not necessary in this or any other civil proceeding.

The complaint sets out succinctly, but clearly, the plaintiff's demand in all of its particulars, and on whose account the same accrued, and it is not perceived that any difficulty could arise in ascertaining to which class of liens it belonged.

If our construction of the complaint be correct, it results that the circuit court committed no error in overruling the demurrer of the defendant.

Notwithstanding the demurrer is of the distinctive character set out, yet the defendant's counsel contends, that inasmuch as the sixth cause is general, the demurrer should be regarded and treated as a general one, and upon its being overruled, he had a right to plead to the merits, &c. We think however, that after assigning five special causes, and

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some of those confessedly go merely to the form of the complaint, the defendant cannot change the character of his demurrer, by adding a general cause. Wherever special causes are assigned, the demurrer should be regarded as it evidently must have been intended by the pleader, as a special demurrer. If so regarded, the court would have the power (R. C. 458) "to proceed and give judgment according as the very right of the cause and the matter in law shall appear," &c., or the court might "amend every such defect or other imperfection, in any process or pleading, &c. other than those which the party demurring shall specially express in his demurrer." When therefore a party by his special demurrer, attempts to defeat the right of amendment, his pleadings should not be regarded with any special favor.

After the demurrer was overruled by the court, should leave have been given the defendant to plead the merits? Clearly not, if the rule above referred to is to have any operation. The statute vests the court with the power of amending any process, pleading or proceeding, in any action before such court, either in form or substance, for the furtherance of justice, on such terms as shall be just, at any time before final judgment rendered therein; R. C. 1835, p. 467. Here the court have the power, under the exercise of a sound discretion, to permit amendments; but this court cannot review the action of the circuit court, when that court refuses to exercise such power. What would be a proper and very judicious exercise of discretionary power in one section of the State, and under certain circumstances which this court has no means of knowing, would perhaps be very unwise and oppressive in another quarter, and under a different state of circumstances. Hardships will occasionally arise under an inflexible rule, not to permit a defendant to plead to the merits, after he has demurred specially, and his demurrer has been overruled; and yet it may be necessary to enforce some such rule in a court where there is a very great amount of business; otherwise the time of the court might be unnecessarily taken up with special demurrers, greatly to the prejudice of the public interest. In ordinary cases, no evil can arise from requiring the party demurring specially, to stand upon his demurrer—whilst the rule would save the courts much time and perplexity, by making counsel more cautious in their pleadings, and admonish them never to demur, unless they were fully satisfied in their own judgment that the law was with them.

The circuit court having entered judgment by default against the defendant, it becomes necessary to ascertain the effect, or consequences of such a judgment.

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The defendant, by demurring, having admitted the facts set out in the complaint, and the court applying the law thereto, and finding them sufficient to entitle the plaintiff to have his action, precludes the defendant thereafter from showing that the plaintiff should not recover.

If the judgment in this case be in effect an admission of the plaintiff's right to recover, then the court committed no error in refusing the first instruction asked for by the defendant. It was an indirect effort on his part, to defeat a right which by his pleadings, he had admitted. There was no error in giving the charge, which the court did, to the jury.

The motion for a re-assessment of damages was properly overruled.

The other judges concurring herein, the judgment of the circuit court is affirmed.

THE CITY OF ST. LOUIS vs. WM. RUSSELL.

1. The Legislature has power to alter or abolish any public municipal corporation.
2. It is not necessary that each member of such corporation should assent to an alteration of its charter: it is sufficient if a majority assent.
3. In making such alteration, however, the Legislature cannot disregard vested rights of individuals or corporations.
4. The act of 1841, altering the charter and extending the limits of the city of St. Louis, being accepted by a majority of the citizens of St. Louis, although such extension were against the consent of those included in the city limits by the extension, is constitutional.
5. Corporations have only such powers as are specially given by their charter, or are necessary to carry into effect some specified power.
6. Although the provision in the charter of 1841, which gives to the city of St. Louis power "*to levy and collect taxes upon all persons and property made taxable by law for State purposes,*" may give room to doubt the power of the city to sell land for the non-payment of taxes, yet the 8th section of 6th art. of the charter recognizes the power, and leaves no room to doubt. It provides, "That the mayor and city council shall have power by ordinance to direct the manner in which any property, real or personal, advertised for sale, or sold for taxes by authority of the corporation, may be redeemed."

The City of St. Louis vs. Russell.

APPEAL from St. Louis Circuit Court.

C. D. DRAKE, for Appellant.

POINTS AND AUTHORITIES.

1. The legislative power vested by the Constitution in the General Assembly is *absolute* over all matters of domestic government, unless restrained by provisions contained in the State or National constitution.

2. The State Constitution imposes no restriction upon the power of the General Assembly in this respect. 1 Tucker's Commentaries, 162-3-4.

3. The incorporation of cities being a legislative grant of political power, creating a civil institution to be employed in the administration of the government, is a matter in which the legislature may act, according to its own judgment, unrestrained by any limitation of its power, imposed by the Constitution of the United States. Dartmouth College vs. Woodward, 4th Wheaton, 518; Terrill & others vs. Taylor and others, 9 Cranch 52; 1st Tucker's Commentaries, 162-3-4.

4. The acceptance, by the people of St. Louis, of the charter of 1822, by which the town was erected into a city, was not in any sense, a contract between the State and the people of St. Louis; or, if a contract, the power to repeal, alter, amend, or modify it at pleasure, was expressly reserved in the last section of the act. 1 Territorial Laws, 973; 1 Tucker's Com. 164.

5. The limits of the city of St. Louis, as established by the charter of 1822, did not, by the popular acceptance of the charter, become permanent and unalterable, but were subject to be changed by the legislature at pleasure.

6. The consent of inhabitants residing out of the city limits, was not at all necessary to the extension of the limits so as to bring them within the city. The legislature was fully authorized to make the extension, with or without such consent, and against opposition from any quarter.

7. The act of 1831, supplementary to the charter of 1822, in which provision was made for the extension of the city limits over adjacent territory, when *requested* by the inhabitants of such territory, and consented to by the people of the city, was merely permissive of the extension, without the necessity of the action of the legislature, and did not establish a principle or contract that such extension should take place in no other way. 2 Territorial Laws, 244.

8. The extension of the city limits by the act of 1841, was a legiti-

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mate exercise of the legislative power, not violative of the State or National Constitution.

9. The land of the complainant brought into the city, by the extension of the limits in 1841, was the subject of taxation by the city, notwithstanding he did not consent, but was opposed to the extension.

10. The 17th sec. of article 7, of the charter of 1841, restricting the rate of taxation upon the property lying outside of the former limits, to one-sixteenth of one per cent., *until the city should pave certain streets*, presents no bar to the collection of the tax assessed in 1842, upon complainant's property, even though it be true that the streets were not paved, because it does not appear in the bill that the tax exceeded one-sixteenth of one per cent. on the value of complainant's property.

11. The city had power to sell complainant's land for the taxes assessed upon it.

H. S. GEYER, for Appellee.

The complainant, now appellee, insists, that the demurrer of the appellant to the bill was properly overruled, on the following grounds:

1st. That although the first act of incorporation, as well as succeeding acts, reserved a power to alter, amend, or repeal, such reservation does not authorize the legislature to bring within, and subject to the debts and power of the corporation, any persons or property not included by the first act, without the consent of such persons.

2d. The provisions of the act of 15th January, 1831, and the 3d sec. of the act of 8th February, 1839, in relation to the extension of the boundaries, were not subject to repeal or alteration, without the assent of those whose property was to be affected by such change.

3d. The act of the 15th January, 1831, re-enacted in the act of Feb. 1839, amounted to a contract by which the faith of the State was pledged, as well to those without as to those within the city, that no lands should be annexed to the city in any manner, other than that prescribed by those acts; which act the legislature could not constitutionally alter or change.

4th. The city, as it existed prior to 1841, was a distinct person in law, from whose debts the complainant was exempt, and the attempt to subject the person and property of the complainant to such debts, is contrary to the constitution.

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5th. The complainant could not lawfully be made a member of an existing corporation, without his consent, so as to subject his property to the debts and powers of such corporation.

6th. Independent of every other consideration, the corporation of the city of St. Louis has not power to sell, or authorize the sale of real estate for taxes, and for that reason, the demurrer was properly overruled. *Ellis vs. Marshall*, 2 Mass. R. 269.

7th. The legislature can only exercise such powers, as have been delegated to it, and when it transcends these limits, its acts are utterly void. *Taylor vs. Porter & Ford*, 4th Hill, 140.

8th. Statutes which violate the plain and obvious principles of common right and common reason, are null and void. *Ham vs. Claws*, 1 Bay, 98.

9th. A statute incorporating certain persons for purposes of private advantage or emolument, does not bind any person named therein, unless he consent thereto. *Ellis vs. Marshall*, 2 Mass. Rep. 269; 4th Peters, 167.

10th. A corporation has no power, except what is given by its incorporating act, either expressly, or as incidental to its existence. *Head vs. Providence Ins. Co.*, 2 Cranch, 127; 4 Wheaton, 636; 4 Peters, 152; *Goszler vs. Corporation of Georgetown*, 6 Wheaton, 597.

11th. A power to purchase, survey and locate land, to make partition thereof, and levy taxes thereon, to defray the expenses thereof, and all other necessary expenses, did not authorize the corporation to tax the land, for the purpose of paying State taxes thereon. *Beaty vs. Knowler*, 4 Pet. 152.

12th. A corporation cannot exercise the power of creating forfeitures, unless it be expressly granted. *Collier vs. Doty*, 6 Ham. 395.

13th. When a tax has been legally assessed, by a corporation clothed with competent powers, the proportion which each individual is bound to pay, becomes a debt which may be recovered at the suit of the corporation. But unless it is expressly authorized by the charter, summary proceedings by distress, warrant and sale, though directed by a by-law, is no justification, in an action brought against the officer executing the process, by the person whose goods are seized. *Berger vs. Clarkson*, 1 Halsted, 352.

NAPTON, J. delivered the opinion of the court.

Russell filed his bill in the circuit court of St. Louis county, praying

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an injunction to restrain the city from selling his land for city taxes. The facts upon which he based his right to enjoin, are stated to be these: Russell purchased a tract of land lying adjoining the city of St. Louis about the year 1828, of which he then took possession, and has occupied and cultivated as a farm ever since. In 1822 the charter of St. Louis defined the boundaries of the city, and those boundaries continued unchanged until 1839, when another charter was obtained from the legislature, by which the southern boundary of the city was slightly altered. By this act, it was also provided, that if the proprietors of land adjoining St. Louis, laid off their land into lots, it might be made a part of the city upon petition of two-thirds of the owners, and with the assent of the inhabitants. The charter of 1841, enlarged the limits of the city, so as to take in several farms and gardens adjoining the city, and this law was passed, as the complainant alledges, against the remonstrances of the owners of these lots, and amongst others of the complainant Russell. This charter, so far as the boundary of the city is concerned, was re-enacted in 1843, and by color of these two acts, the city authorities proceeded to levy taxes on Russell's land, and to sell the same for the non-payment thereof. These proceedings the complainant considers not warranted by the charter, or if they are so warranted, not sanctioned by the constitution of this State or of the United States.

This case was transferred to the court of common pleas, where a demurrer was filed; and the case having been re-transferred to the circuit court, that court overruled the demurrer, and made the injunction perpetual.

The only questions arising here, are, first, as to the power of the legislature to enlarge the limits of the city of St. Louis, against the will of the inhabitants brought into the city by such extension; and second, the power of the city corporation, under its charter, to sell lands for the non-payment of city taxes.

The right of a State legislature, to change, modify, enlarge, or restrain the charter of a public municipal corporation, established for public purposes, has been conceded in all the adjudicated cases, both of the Federal and State Courts, to which we have been referred. *Terrill vs. Taylor*, 9 Cranch, 52; *Dartmouth College vs. Woodward*, 4th Wheaton; 2 Kent's Com. 206; 1st Tucker Com. 162. That this power may not be exercised in such a mode as to infringe any right of private property, is equally well established. In the *Dartmouth College* case, a case of much celebrity on this branch of Constitutional law, the court declared that "if the act of incorporation be a grant of political power,

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if it create a civil institution to be employed in the administration of government, or if the funds of the college be public property, or if the State, as a government, be alone interested in its transactions, the subject is one in which the legislature may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States."

It seems to be a settled principle in the English Courts, that the acceptance of the charter is essential to create a body corporate, and that the government cannot compel persons to become coporators without their assent, or at least without the assent of a majority, though this assent is generally inferred from the acts of the incorporation. 4 Burr. 2200; 3 Term Rep. 240. This doctrine is no doubt equally applicable in this county in all cases of *private* corporations. A man may refuse a grant, whether from the government or an individual; he may decline to improve his property, and the legislature cannot compel him, however much, in their estimation, he may have mistaken his own interests. *Ellis vs. Marshall*, 2 Mass. Rep. 276. But this doctrine cannot be applicable to public municipal corporations, except in the modified form to which we have alluded. The assent of every individual corporator cannot be necessary to the creation or alteration of a city charter; the assent of the majority alone puts in operation this "government within a government," and its future action under the charter raises the presumption that all have acquiesced.

If the legislature had the power to annul the charter of St. Louis, *in toto*, a power which is conceded in most of the acts of incorporation, and which existed independent of any such concession, upon what principle can they be denied the power of alteration. The power to destroy of necessity includes the power to alter or effect a partial destruction, as much so as the whole is greater than a part. The legislature then had the power to repeal the charter of 1839, *in toto*; and if the charter of 1841, had embraced the entire county of St. Louis, and been accepted and acted on by the majority of the corporators, such an act would not be an infringement upon the Constitution of this State or of the United States.

It is not to be understood that in the exercise of this power to alter, amend or abolish city and town charters of incorporation, the legislature may disregard the vested rights either of individuals or corporations, which are protected by the principles of every free government, and by our State and Federal Constitutions in particular.

The complaint of Russell is, that his land has been embraced within the limits of the corporation of St. Louis, against his consent. This

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consent is not, we think, necessary to authorize the legislature to exercise its power in creating, enlarging, or restraining public municipal corporations. If other rights of Russell have been infringed; if his private property has been taken for the public use, without just compensation being made; or if his land has been subjected to pay the debts of another, whether that other person be a natural or artificial one, without his consent, either express or implied, he is certainly not without remedy. Such infringements of private right, are provided against by our written constitution, as well as condemned by the fundamental principles of every republican government, and it would be neither respectful to the legislature, or the corporation which they have created, to suppose that any such wanton violations of right would be attempted.

The question remaining to be considered, is the right of the city of St. Louis to sell lands for the non-payment of the taxes thereon. On this point we assume it to be the settled doctrine, that corporations have only such powers as are specifically given by charter, or are necessary to carry into effect some specified power. The exercise of a corporate franchise, being restrictive of individual right, must be within the letter and spirit of the act of incorporation. The power to impose a tax on real estate, and to sell it where there is a failure to pay the tax, is a high prerogative, and should never be exercised where the right is doubtful. (*Beaty vs. Knowler*, 4 Peters, 152.)

The charter of 1841, gives to the city council of St. Louis power "to levy and collect taxes, not exceeding one half of one per centum, upon *all persons and property* made taxable by law for State purposes." If this section of the act were alone on this subject, there might be room for contending that the sale of land was not the only or the necessary mode by which the tax could be collected, and therefore the power of sale would not arise by implication, from the granted power "to levy and collect." But we regard the 8th section of the 6th article of the charter, as a legislative interpretation of this power "to levy and collect taxes." That section provides that the mayor and city council shall have power by ordinance, to direct the manner in which any property, real or personal, advertised for sale, or sold for taxes by authority of the corporation, may be redeemed. This is a clear and distinct recognition of the power in the city to sell land for the non-payment of taxes, and is sufficient to remove any doubts, which the general phraseology of the previous article might create.

The judgment of the St. Louis circuit court will, therefore, be reversed, and this court doth order and adjudge, that the injunction granted by said court be dissolved, and the bill of complainant dismissed.

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ALEXANDER & BETTS vs. SAMUEL MERRY.

1. It is not necessary that an officer in certifying the acknowledgment or proof of a deed, should use the exact words of the statute. A substantial compliance with the statute is sufficient. As where the statute requires the officer to certify that the person acknowledging a deed "was *personally known* to him," it is sufficient if he certify that "he was known to him."
2. A sheriff's sale is within the statute of frauds, and until a deed is executed the fee is in the debt.
3. Although a sheriff's deed is within the statute of frauds, yet a sale by sheriff is not void, although no deed or memorandum in writing be made. When a deed is made, it will relate back and take effect from the sale.
4. Such relation back will, however, only affect parties or privies to the sale, and will not at law hold against a stranger.

APPEAL from St. Louis Circuit Court.

SPALDING & TIFFANY, for Appellants.

POINTS AND AUTHORITIES.

1. The deed from Janes to Loper was improperly admitted in evidence, it not having been sufficiently proved; Rev. Code, 121, sections 14, 15, 16.

There is a failure in the certificate to alledge the identity as the law requires; and also it is not stated that the clerk *personally knew the subscribing witness, &c.*

2. The deed from Loper to Merry was improperly admitted in evidence, as it was not proved according to law; Rev. Code, 121. The certificate on this deed does not show that the witness proved any execution of it. He merely proves *identity*.

3. The deed of sheriff Walker, the successor of Brown, who sold to Gamble, passed the title of the lot in question. This point has been considered in the supreme court and decided adversely to us. See the cases of *Evans vs. Wilder*, 5 Mo. Rep. 313; *same vs. same*; 7 Mo. Rep. 359; *Evans vs. Ashley*, 8 Mo. Rep. 177.

4. The deed made by sheriff Brotherton on petition and order of the circuit court, made in August, 1842, passed the title of the lot in question; Rev. Code, p. 260, sec. 51; old Rev. Code, p. 370, sec. 23; *Geyer's Digest*, p. 269, sec. 74; 1 Ed. Com. 121, sec. 49. *First.* The case of expiration of office is within the equity of the act; 7 Mo. Rep. 359, at page 366; 8 Mo. Rep. at page 182-3. *Second.* The acts in

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force in 1821, 2, 3 and 4, respecting the mode of getting sheriff's deed, on death or removal of sheriff, provided no mode of getting the deed in case of the expiration of his office; though the reasons are as urgent in the latter as former: hence the necessity of construing the word *removal* so as to embrace the case. *Third.* The statutes expressly provide for the case; Rev. Code of 1835, page 385, sec. 36 and 38, and page 379, sec. 1; Rev. Code of 1825, page 500, sec. 13. These acts show that the right acquired by Gamble's purchase was preserved, and the mode of perfecting it, by getting a deed, is also preserved.

5. The deed by Brown, the sheriff, (who made the sale) after his office had expired, passed the title. This deed is dated 15th September, 1842. *First.* There never had been any provision in the statutes for obtaining a sheriff's deed, in cases of sale and expiration of office before the deed made, until the old Rev. Code, which took effect in 1825. *Second.* But there was, as early as 1807, a provision enacted which has been continued down to the present time, providing for getting the deed where the sheriff sells and *dies*, or is *removed*, before executing his deed; see Edwards Com. 129; Geyer's Dig. 269 and the Codes. *Third.* In the Code of 1825, and also of 1835, it is provided, that the sheriff if he commences the execution shall complete it; and thus may make the deed at any time after, if he has only begun to execute the writ before he goes out of office. *Fourth.* Hence the inference that the law makers contemplated in 1807, that the sheriff, if he had begun to execute the writ, should go on to complete it, even after the expiration of his office. *Fifth.* The reasons for this inference, are the necessity of the case, the silence of the written law, the propriety of the completion of the writ by the person who commenced it, and was actually perhaps executing it when his office expired; and the fact that the same circumstances have caused the legal mind of England to adopt the same unwritten law, as well as of many of our sister States; 5 Har. & John. 69, sheriff levies on property and goes out of office; the *venditioni exponas* must be directed to him and not to his successor; 2 Bac. Abridgement, 739, the sheriff that commenced execution must proceed with same; Watson on Sheriff, 61 (5 Law Lib'y, 55) to same effect; 6 Bac. Ab. 161; 2 John. Chy. Rep. 179, 180; 4 Bibb's Rep. 21, Allen vs. Trimble, a sheriff's deed for lands, made by him after he was out of office, held valid on general principle; 3rd Cowen's Rep. 208. The officer who received and levied the execution must perfect it, the whole proceeding being considered one thing; and therefore the sheriff, though out of office, must receive the redemption money, &c.; 3rd Cowen's Rep. 95, Jackson vs. Collins, sale on execution of lands com-

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pleted after sheriff was out of office, he having commenced while in, and held good; 3 Scammon's Rep. 551, if an execution is levied while it is alive, the sale may be made afterwards, and it is the duty of the officer that levied to proceed and sell, no matter what becomes of the execution; 8 Mo. Rep. 177, Evans vs. Ashley, where this doctrine is recognized, (i. e.) that the officer commencing must complete the execution at common law, even though his office has expired. *Sixth.* If such were not the law before, yet it became the law, being one of the principles of the common law, introduced in 1816; Geyer's Digest, 124; 1st Edwards' Compilation, 436, act introducing the common law. If the Spanish law was silent on this subject, then this act by its very terms brought in the common law. *Seventh.* The common law, applicable to past acts, is not repealed by the codes of 1825 or 1835 as they are prospective, and as those codes provide for the validity of past acts. *Eighth.* Our statutes preserve the right.

6. The fact that the giving the deed of sheriff was prohibited by the act of 1821, till the lapse of three years from the sale, does not prevent the application of the principle, that the officer who begins the enforcement of an execution must complete it, because, *First,* The act suspending the execution of the deed, and providing for the execution by the succeeding sheriff, having been repealed 11th January, 1822, (see Edwards' Compilation, page 863,) the common law was restored. *Second,* The act for the relief of debtors and creditors was unconstitutional, and therefore the sale to Gamble was absolute, and Brown had the right to make his deed as sheriff as soon as the sale was made.

The judgments on which the sale was made were rendered before the passage of the act, and one of the executions was also issued before the 28th June, 1821, which was the date of the approval of that act; 1 Howard's Rep. 311, Brown vs. Kinzie; 2 I bid 608, McCrackin vs. Hayward. These cases show that any State law, impairing or diminishing the rights of a creditor under a previous contract or judgment, is repugnant to the federal constitution. The act aforesaid did impair the creditors right, for under it he could only sell a redeemable interest, with a right of occupancy in the debtor for several years, whereas before, he could have sold the absolute and indefeasible title in fee with immediate right of possession in the purchaser; 5th Mo. Rep. 518. The court say, that if the act was unconstitutional, then the sheriff's sale would pass the title absolutely.

7. The failure of the sheriff making the sale to mention the purchaser, and describe the lands sold in the return on the execution, does not

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vitiates the sale. *First.* The general principle established, is that the title of the purchaser at sheriff's sale is not affected by irregularities; 10 Peter's Rep. 450, Voorhees vs. Bank of United States; 8 John. Rep. 351. It is not affected by irregularity of execution, nor by any matter, subsequent to the sale, occurring between the parties; 1 Cowen, 711. Sale good on execution issuing after judgment rendered a year and a day, without any renewal, even though the execution shall be afterwards set aside; 9 Cowen, 182; 4 Wend. Rep. 588—462; 10 John. 381; 2 Ten. Rep. 44; 1 Cowen, 622, where the judgment has been previously paid and satisfied, yet the purchaser at sheriff's sale will hold, unless he had notice of such payment at time of his purchase; 1 John. Rep. 45; 9 Cowen, 536—182; 4 Wend. 588; 8 Wend. 676. *Second.* And this irregularity, if it be one, has been considered by courts, and held not to affect the *bona fide* purchaser's title; 4 Wend. Rep. 462. It is not necessary on the return of the execution to describe the lands sold; 1 Johnson's cases, 153. An incorrect return by sheriff of *fi. fa.* will not defeat the sale, or prejudice the purchaser's title. The return is not essential to the title of the purchaser; (See page 155.) 1 Taylor's N. C. Rep. 10. A sale of land by the sheriff is valid, though no return is made of the execution. 1 Murphy, North Car. 507. The title of purchaser at sheriff's sale is not affected by a false return of the sheriff, that another person purchased, 6 Har. & John. 182. If the return of the sheriff does not set out the name of the purchaser, and there is no description of the land sold, the sale will not thereby be vitiated. The return of the sheriff does not give title.

8. The statute of frauds has no bearing upon the validity of Brown's deed; for though that statute requires a memorandum in writing, in order that a sale of lands be valid, and we should admit that it is applicable as well to sheriffs' as to other sales; yet it does not enact that sales shall be void, unless the memorandum or deed be made *at time of the sale*. The question therefore does not arise, which might become important, if no deed had been made, and we now called on the court to cause a deed to be made.

It was decided in New York that no title passed by a sheriff's sale, unless some written instrument was executed; and this is true here, as well as in New York, for our acts require a deed to be made. But the sale is valid, whether a memorandum is made or not, and the court will hold it valid and compel the sheriff to make a deed.

9. Merry, the appellee, purchased with full notice of the sale to Gamble, under which the appellant derives title; all the deeds contain a reference to the sheriff's sale to Gamble. Brown's deed, therefore,

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relates back to the time of sale as to him, and is a complete defence to the action; so that the judgment below should have been for the defendants.

20 John. 537, admits the general doctrine, that an estate created by execution of power, is to have relation back so as to take effect from the date of the power; but this is a fiction which is not to injure strangers. 15th John. Rep. 309: The sheriff's deed relates back to the time of the sale, though not executed till after the date of the sale. 3 Cowen, 75; 2 Wend. 507: A deed given by sheriff on previous sale on execution, relates back *to*, and in judgment of law, is executed *at*, the time of sale.

10. The notice to Merry of the sheriff's sale appears from the deeds to Merry, and Janes' deed to Loper, all of which refer to that sale, and whether they did or not, both Loper and Merry were chargeable with notice from the record of the judgments against Janes, and of the executions and return thereon, and also from Walker, sheriff's deed, which recites the sale, and was recorded on the 17th December, 1824; and also from the possession by defendant below and those under whom they claimed. 2 Mass. Rep. 508; 4 Mass. Rep. 628; 6 Wend. 223: Possession is notice of the title under the Registry Acts. 4 Mo Rep. 62, Bartlett vs. Glasscock; 2 J. J. Marshall, 434: Such notice prevents Merry from availing himself of the principle, that no legal fiction shall work injury to innocent third persons.

11. The lapse of time does not prevent Brown, the former sheriff, from executing the deed, carrying into effect the sale made by him, 'as against Merry who had notice, and risked his money on the purchase, as a speculation, with his eyes open. *First.* In practice, the sheriff's deed is seldom made at the time of sale, usually some days afterwards, and it has never been thought that the judgment debtor could alienate in the meantime. *Second.* It is not establishing a dangerous principle; for the late sheriff makes a deed which is valid only, where he had, while sheriff, made a sale, and valid only as against those who had notice of that sale. It is precisely, in principle, the same as if the contest was between Janes and the appellants; between the defendant in the judgment and the purchaser at sheriff's sale, where the purchaser took possession under the sale.

GEYER, for Appellee.

In support of the judgment of the circuit court, the appellee submits the following propositions:

1. The authority of a sheriff or other person, to sell and convey the real estate of another, depends wholly upon statute law. To make the conveyance operative, all the requisites of the statute must be complied with, and this must be shown by the evidences which the statute requires; none other will suffice; *Parrington vs. Loring*, 7 Mass. Rep. 388; *Wilson vs. Loring*, 7 Mass. Rep. 392; *Davis vs. Maynard*, 9 lb. 242; *Wellington vs. Gale*, 13 lb. 483; *Williams vs. Avery*, 14 lb. 20.

2. In August, 1821, when the sale is said to have been made, the law required the sheriff to grant to the purchaser a certificate instead of a deed, and to sign and file for record a duplicate thereof in ten days, which should be taken as evidence of the facts therein stated. This certificate is indispensable; no other evidence of the fact of sale is admissible; *Davis vs. Maynard*, 9 Mass. Rep. 242; *Parrington vs. Loring*, 7 lb. 388, and other cases above cited.

3. The certificate signed by J. K. Walker, deputy sheriff, is not a compliance with the law, it is not the act of the sheriff, and is a mere nullity. *Evans vs. Wilder*, 7 Mo. Rep. 359; *Evans vs. Ashley*, 8 Mo. Rep. 177. Being null, it does not and cannot be regarded as evidence of anything. It cannot be made the foundation of other proceedings or used as evidence of sale. *Cow. & Hill's notes to Phillips*, part 2 p. 1246-7.

4. The alleged sheriff's sale is not only without any evidence required by the statute, but there is not even a memorandum itself, as required by the statute of frauds. See *Evans vs. Wilder*, and *Evans vs. Ashley* above cited. Consequently the claim of appellants under that sale cannot be sustained at law or in equity. *Miller vs. Henshaw* 4 Dana, 329, 330; 2 Serg't & Raw. 455.

5. The deed of Walker is inoperative to pass Title. He had no authority to make it, if there had been evidence of the sale. *Evans vs. Wilder*, and *Evans vs. Ashley*, above cited.

6. The facts stated by a sheriff in his return, or in a deed made by him, are received as evidence, only because they are made on the responsibility of his official oath and bond. Statements which are not so made, whether by a sheriff in or out of office, are not evidence of the facts stated, even where oral evidence is admissible. The recitals therefore in the deeds executed by Walker, Brotherton & Brown, are no evidence, and as there is nothing else tending to show a compliance with the requisites of the law, the deeds are inoperative for that reason, if none other existed. Recitals of records do not dispense with their production. *Cowen & Hill's notes*, part 2, page 1291-2.

7th. If the recitals are received as evidence, still they are not suffi-

cient, because still it appears there was no certificate of the sale, and the executions recited are not those in virtue of which the levy was made, and the sale advertised; these defects are not supplied by the returns on the execution, or the exhibition of a copy of the advertisement.

8. Neither the deed from Brotherton, who was sheriff in 1842, nor that of Brown who had been sheriff in 1821, can operate to defeat the action of the plaintiff, because they were made after the commencement of the suit, and are withal unsupported by the evidence of authority to sell, and of sale which the law requires.

9. The order of the circuit court directing Brotherton, then sheriff, to execute a deed is a nullity—there being then no law in force authorizing such proceeding in the case. The statute in force in 1821, the time of sale, had been repealed some seventeen years before, and the statute then in force, R. C. 1835, sec. 49, 50, and 51, was in its terms prospective, and could not be made to operate retrospectively by the legislature, or the court, consistently with the constitution; besides if this had been the case of a sale after the passage of the act, still it was not a case of a sheriff having died, being removed from office, or becoming disqualified, and therefore not a case in which the court could act in an *ex parte* proceeding at law. Bur. 1456; 1 W. Black 451, §6; 3 Dal. 378; 1 Con. Rep. 16; Evans vs. Wilder, 7 Mo. Rep. 359; Evans vs. Ashléy, 8th Mo. Rep. 177.

10. If the power of the circuit court to make the order is assumed, still the only question of fact, which that court could or did determine, is the payment of the purchase money. All other facts remain to be proved as before, and as in this case they were not proved, (the statements in the petition and recitals in the deed, being no evidence at least against the plaintiff below,) the deed is not supported by proof of compliance with the requisites of the law. Bac. A. Statute, 3 Dal. 378; 7 Mo. Rep. 359.

11. The deed made by J. C. Brown, who was Sheriff in 1821, is inoperative to pass title, because it is not supported by any evidence of a compliance with the essential requisites of a valid sale—his recitals are not evidence, because they are not a return or *quasi* return, made under the sanction of an official oath, or the responsibility of an official bond—and because the deed is the act of a private citizen, attempting to convey the property of another without the authority of law.

12. Brown had no power to make the deed by common law, because the seizure and sale of lands by execution were unknown to the common law; they owe their introduction to statutes; besides the common

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law was not in force when the act of 1807 was passed, and that act, Geyer's Dig, page 269, sec. 74, makes provision for the very case at bar. *Evans vs. Wilder*, 7 Mo. Rep. 359. That act was repealed, and other provisions enacted in 1825, and afterwards in 1835, so that no part of the common law, if there had been any on the subject, ever was in force in this State.

13. The deed of Brown is not operative under any statute, because the act of 1807, and with it any common law power was taken away by the act of 1825, repealed subsequently by that of 1835, which was the only law in force at the date of the deed, and under that Brown could not act, because the power exists only in cases of sales subsequent to its passage.

14. The authority of J. C. Brown to make the deed, cannot be sustained by any supposed continuance of the operation of laws, common or statute, after their repeal. The repeal does not affect any act done, right accrued or established, or any proceedings commenced previously, but no law continues a power which might be given to or withdrawn at pleasure from any officer.

15. If the deeds of Brown and Brotherton, or either of them, can be regarded as operative, they cannot be made to operate before their execution and delivery, and so cannot affect the title of the plaintiff below, which had become vested many years before.

16. The proof of the deeds from James to Loper, and from Loper to plaintiff, is sufficient, and such deeds were properly received in evidence. *Jackson, ex dem. &c. vs. Livingston*, 6 John. Rep. 149; *Jackson, ex dem., Wood vs. Harron*, 11 J. R. 434; *Jackson vs. Vickory*, 1 Wend. 406; *Jackson vs. Phillips*, 9 Cow. 94; *Jackson vs. Gumaer*, 2 Cow. 552; *Norman vs. Wells*, 17 Wend. 136.

All that is required on the frame of certificates of proof or acknowledgments of deeds, is a substantial compliance with the laws under which they are made. They are to be liberally construed, and to be sustained if possible by legal intendment. *Jackson vs. Stanton*, 2 Cow. 552, 557; *Loughborough vs. Parker*, 12 Serg't & R. 48; *Forman vs. London*, 13 do. 386; *Hall vs. Gillings*, 2 Har. & Jn. 390; *Talbot's lessee vs. Simpson*, 1 Peter's Rep. 191; *McIntosh vs. Ward*, 5 Bin. 296; *Shaller vs. Brand*, 6 do. 435; *Nantz vs. Bailey*, 3 Dana 113, 119; *Phillips vs. Ruple*, Litt. Sel. Cases 221; *lessee of Hunter vs. Bryan*, 2 Murphy 178; *Horton vs. Hagler*, 1 Hawke's Rep. 48. The objection to the deed was too general. 17 Wend. 142; *Real vs. McAlister*, 13 Wend. 109; *Ohio Ins. Co. vs. Emerson*, 5 Mill La. Rep. 295, 300; *Mandeville vs. Perry*, 6 Call. 78.

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Scott, J., delivered the opinion of the court.

In July, 1842, Merry brought an action of ejectment against Betts for a lot of ground in the city of St. Louis, and at the return term of the writ, on motion, B. W. Alexander was made a co-defendant. Merry obtained judgment, and Betts and Alexander appealed to this court.

Merry claimed title through Joseph Janes, whose ownership was the source of title to both parties in the cause. By a deed made the 16th Dec., 1835, Janes conveyed all his interest in the lot to James Loper. This deed recited the fact that the lot thereby conveyed, had been sold under the redemption law to A. Gamble, Book M, page 182. It was proved on the 31st January, 1838, before the clerk of the district court of the United States for the eastern district of Louisiana, by Wm. T. Lewis and Wm. Y. Lewis, the subscribing witness thereto. The certificate of proof stated that the witnesses were known to the officer to be the persons whose names were subscribed to the deed, who, under oath, declared that Joseph Janes was the real person whose name was subscribed to the said deed as a party thereto, and that he signed the same in the presence of the said witnesses, and that they subscribed thereto as witnesses thereof. This deed was recorded on the 22d June, 1838. By deed bearing date on the 21st day of January, 1826, Loper conveyed one-half of the lot to Samuel Merry. In this deed it was also recited that the lot had been sold under the redemption law to A. Gamble, as recorded in book M, page 182. This deed was proved before the clerk of the circuit court of St. Louis county by John Riggins, a subscribing witness thereto, on the 23d of October, 1837.

The certificate of proof stated that John Riggins, personally known to me to be the real person whose name is subscribed to said foregoing instrument as a party thereto, who, being by me duly sworn, upon his oath declared that James Loper, whose name was subscribed to said instrument as a party thereto was the real person who executed the same, and that the said Riggins signed said instrument as a witness thereto.

John W. Walsh, public administrator of St. Louis county, by virtue of an order of the county court of St. Louis county, made on the application of the said Walsh, administrator of said Loper, on the 2d day of September, 1840, for the purpose of paying the debts due by Loper, sold and conveyed to Merry all the lot in dispute. In the proceedings of the county court relative to the sale of this lot, whenever the lot was described, it was represented as having been sold to A. Gamble, under the redemption law, book M, page 182.

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It was admitted that the defendant Betts was in possession of the lot in controversy, under Alexander, at the commencement of this suit.

Loper's death, and the administration of his estate by Walsh, the public administrator, were admitted.

The plaintiff also gave in evidence a notice in writing, signed by Loper, addressed to B. W. Alexander, informing him of his claim to the lot in controversy, and warning him that he would pay for no improvements made on the lot.

The plaintiff, on his part, offered in evidence records of two judgments recovered in the circuit court of St. Louis county, on appeal and *certiorari* from justice's courts. One in the name of James P. Parker against George W. Ferguson, and Joseph Janes, his security in the appeal bond, for \$56 02 1-2, with interest and costs, and dated 16th May, 1821,—the other in the name of Peter Ferguson, against Joseph Janes and William H. Pococke, the security in the bond for a *certiorari* for the sum of \$43 50, and costs, and dated on the 31st May, 1831. On these judgments, executions severally issued on the 16th and 31st May, 1821, under and by virtue of which, as well as of other executions, as appears by the advertisement of sale, the lot in controversy was sold at sheriff's sale, on the 21st day of August, 1821, to A. Gamble, who received from the sheriff a certificate, of which the following is a copy:—

"I, Joseph Brown, sheriff of the county of St. Louis, to all whom it may concern, certify that by virtue of sundry executions to me directed, from the circuit court of St. Louis county, viz: one in favor of Peter Ferguson—one in favor of James P. Parker—one in favor of John Keesucker—and one in favor of C. Wilts, adn'r against Joseph Janes, returnable to August term 1821, I exposed to sale as the law directs, the following property, viz: A lot of ground in the town of St. Louis, (the lot in controversy,) purchased of Moses D. Bates, containing sixty feet front on the Second or Church street, by one hundred and fifty feet deep, bound on the east by the said Church street, on the south and west by lots of Louis Lemonde. And that Archibald Gamble being the highest and last bidder, the same was struck off to him for the sum and price of twenty dollars, and that the said Archibald Gamble will, on the 21st day of February, 1824, be entitled to a deed therefor, unless the same shall be redeemed, by virtue of the act of Assembly, entitled 'an act for the relief of debtors and creditors.'

JOHN K. WALKER, D. Sh'ff.

Recorded this 6th day of Sept., 1821,

ARCHIBALD GAMBLE, Clerk."

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On the 9th day of November, 1824, John K. Walker, who was successor in office to Joseph C. Brown, who was the sheriff when the sale was made, in pursuance of the foregoing certificate, executed to Gamble a deed in the usual form, which was acknowledged in open court, and recorded.

Afterwards, in July, 1842, Gamble, under the provisions of the 51st section of the act concerning executions, petitioned the circuit court of the county of St. Louis, setting out so many of the foregoing facts as relate to the sale of the lot in controversy to him, and prayed that a deed might be made therefor, by the then sheriff of St. Louis county. The petition was granted, and Marshall Brotherton, the sheriff, on the 8th day of August, 1842, executed a deed to Gamble for the lot in dispute, which was acknowledged and recorded.

Afterwards on the 15th day of September, 1842, Jos. C. Brown, who was the sheriff when the sale was made to Gamble in 1821, executed a deed to him for the said lot, which was acknowledged and recorded.

By several *mesne* conveyances, the lot passed from Gamble to Alexander, the present owner, who has made improvements on it to the value of six thousand dollars.

The act for the relief of debtors and creditors, commonly called the redemption law, which was enacted on the 28th of June, 1821, provided that when any lands or tenements should be sold after the 15th July, 1821, by virtue of any execution already issued, or that might thereafter be issued, it should be the duty of the sheriff or coroner instead of executing a deed for the premises sold, to give to the purchaser a certificate in writing, describing the land purchased, and the sum paid therefor, and the time when a purchaser would be entitled to a deed therefor, unless the same should be redeemed, as was provided by the act; and the sheriff should, within ten days from the time of such sale, file in the office of the clerk of the circuit court of the county where the land was, a duplicate of such certificate, *signed by him*, for record, which should be taken as evidence of the facts therein contained, and should be considered as notice to subsequent purchasers and creditors.

A subsequent section of the same act, provided that the defendant might redeem the land within two and a half years from the time of sale, and if it should not be redeemed within that time by the defendant, then any creditor might redeem it within the three years, and within that time a creditor might redeem from a creditor.

The 8th section of the act provided that unless the land should be redeemed by the defendant or some of his creditors within three years

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from the time of sale, then the sheriff or other officer or his successor in office, should complete the sale by executing a deed for the same to the purchaser.

On the 11th January, 1832, the above recited act was repealed, with a saving of the validity of all proceedings under it before the repeal thereof.

The defendant objected to the reading in evidence of the deed from Joseph Janes to James Loper, on account of the insufficiency of the proof, but the objection was overruled, to which an exception was taken. Objections were for the same reason made to the reading of the deed from Loper to Merry, but they were overruled.

The foregoing facts being thrown into shape of a special verdict, a judgment was rendered thereon for Merry the plaintiff, from which Betts & Alexander appealed to this court.

The first point in the cause, is that arising from the admission in evidence of the deed from Joseph Janes to Loper, which was objected to by the defendant, on the ground of the insufficiency of the proof. The statute directs that the certificate of proof, shall set forth as one of the matters thereof, that the subscribing witness was *personally* known to the officer granting the certificate. The certificate as above set forth omits the word *personally*, and merely states, that the witnesses were known to the officer. The question is, whether this omission renders the certificate fatally defective? The 12th section provides, that the grantor acknowledging a deed, shall be personally known to the officer, to be the person whose name is subscribed to the instrument as a party thereto. The 14th section provides, that no proof of a conveyance shall be made by a subscribing witness, unless such witness is personally known to the officer, to be the person whose name is subscribed to the instrument as a witness thereto. The next section provides, that no certificate of proof shall be granted, unless such subscribing witness shall prove that the person whose name is subscribed thereto as a party, is the person who executed the same. This section does not require, it will be seen, that the witness should have a personal knowledge of the grantor. But if the officer is satisfied in any manner by the witness, that he knew the grantor named to be the real party, he may take and certify the instrument. So the law itself would seem to use indiscriminately the term knowledge and personal knowledge. It is not easy to define what is personal knowledge, as contradistinguished from knowledge, uncoupled with that epithet. Instances may be stated wherein the difference is apparent; others may be imagined, where the distinction is not so easily drawn. No doubt the law intended, that

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as the officer acted under oath in taking the proof of deeds, he should have knowledge of the identity of the grantor, or of the subscribing witness, as would enable him to swear, that the grantor or witness was the person he represented himself to be. Its object was to prevent one person from fraudulently personating another. It is much to be desired that every officer who takes the acknowledgment of a deed would conform literally to the law. But we know that the convenience of our people require that the taking of the acknowledgment of deeds, should be entrusted to those who are ignorant of the forms of the law, who will take a proper acknowledgment, and blunder in certifying it. Did it follow as a necessary consequence, that any acknowledgment improperly certified, had been in fact taken under such circumstances as were unwarranted by law, there would be no difficulty in settling this question. Because an officer omits to certify that the grantor was personally known to him, but merely says he was known, it cannot be inferred that the grantor was not personally known. The construction of certificates of knowledge, have frequently engaged the attention of courts, and they all seem impressed with the importance of extending a liberal construction to these instruments. In the case of *Shaller vs. Brand*, 6 Bin. 438, the supreme court of Pennsylvania says, we have always declared: "that it was sufficient, if the law was substantially complied with, and on any other principle of construction, the peace of the country would be seriously affected, as the certificates of the acknowledgments of deeds, have been generally drawn by persons who were either ignorant of, or disregarded the words of the act of assembly. The law must be complied with, but in construing it we shall always be inclined to support a fair conveyance if possible." In the case of *Nantz vs. Bailey*, 3 Dana, the court says, "it is not indispensable that the certificate should state the exact process of examination, in verbal detail, such particularity has never been observed or required. That they would not presume that the officer did not understand the statute, or comprehend his own certificate." The case of *Jackson vs. Gumaer*, 2 Cow. 556, is a case very similar to this. There the Judge failed to certify, that the "grantor was known to him to be the person described in, and who executed the deed." The chief justice in delivering the opinion of the court remarked, "I am unwilling to say that titles which depend for proof upon certificates thus drawn are to be put in jeopardy by the allowance of such a technical objection, for I cannot but consider the acknowledging officer drawing such a certificate, as possessing all the knowledge required by the statute. The summary of all that is to be found in the books on this question is that

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a substantial compliance with the law, is all that is required. When this appears, the courts feel no inclination to disturb the land titles of the country by indulging a severity of criticism on the language of the certificates of the proof or acknowledgment of deeds. From the condition of many portions of this State, the disadvantages under which they labor in regard to legal information, and the necessity of entrusting the execution of the laws in many instances to inexperienced hands an application of these principles of construction, to certificates of acknowledgment or proof will not only be found wholesome, but indispensable to the peace and quiet of the country.

For the determination of this cause, we do not think it necessary to examine into the constitutionality of the law, for the relief of the debtors and creditors, or as it was called the redemption law. If it is considered without any reference to that law, the same difficulty arises from the statute of frauds, as is presented by the irregularity of the certificate of sale, which was issued to the purchaser under the provisions of the act for the relief of debtors and creditors. In the cases of *Evans vs. Wilder*, 7 Mo. Rep. and *Evans vs. Ashley*, 8 Mo. Rep. this court held that certificates of sale under the redemption law, similar to that in the record of this case were void, and that a deed executed by the successor in office of the sheriff who made the sale, was inoperative, on the ground that the law which authorized the successor to make a deed, was repealed before the execution of it. Grant that the redemption law was void, and that an absolute interest in the land was sold by the sheriff, and purchased by Gamble, then comes the statute of frauds, which if not as fatal as the nullity of the redemption law presents insuperable difficulties in the way of the defendant in this action. It has been held by this court that a sheriff's sale is within the statute of frauds. That by the sale alone, no interest in the land passes and that until a deed is executed, the fee is in the debtor. This opinion was not pronounced without authority to sustain it. In the case of *Simonds vs. Catlin*, 2 Caines' Cases 61, Judge Kent, in a State where there was no statutory enactment requiring the sheriff to execute a deed for land sold by him under execution, held that such a sale was within the statute of frauds, and that without a deed the title did not pass. The same doctrine was afterwards maintained in the case of *Gratz vs. Catlin*, 2 J. R. and is afterwards repeatedly recognized in the courts of New York. In a late case in the supreme court of S. Carolina, *Christie vs. Simpson*, 1 Richardson 407, it is held that a sheriff's sale of land under an execution, is within the statute of frauds, and

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without a proper entry or memorandum in writing, the purchaser will not be bound.

Although sheriffs sales of land under an execution, are within the statute of frauds, yet that statute does not make penal contract void, it merely says that no action shall be brought on them. In the case of *Coughlin vs. Knowles*, 7 Metcalfe, it was held that an oral contract for the sale of land, is not utterly void by the statute of frauds, that although such a contract would not be regarded if made the foundation of a suit at law or equity, yet is not a nullity. The same doctrine is maintained in the case of *Lane vs. Shackford* 5th New Hampshire Rep. 133; *McCowen vs. West*, 7 Mo. Rep. 569. Indeed, great would be the mischiefs of a contrary doctrine. Now that which is void cannot be made good by relation. After a sale of land by the sheriff under a judgment, the execution of a deed is frequently delayed for months and years, and yet as against the defendant in the execution, a deed after the lapse of that time has never been thought to be void. If the deed did not relate back to the sale, what would there be to impart to it any validity at the time of its execution. If the sale were considered as a nullity, the officer after the lapse of a reasonable time would have no more authority to make it than an utter stranger. The case of *Jackson vs. McCall*, 3 Cow, 75, fully illustrates the doctrine of relation in regard to sheriffs deeds, and is one resembling this in most respects. There the purchaser at sheriff's sale, which was made in 1818, did not receive a deed until 1823; one of the objections to the admission of the deed in evidence was, that it was not given in a reasonable time. The suit was brought by a devisee of the defendant in the execution. In that case, as in this, the purchase money had been paid. The court held that the plaintiff being the devisee of the judgment, stood in the same relation to the purchaser at the sheriff's sale, that the debtor himself would have stood had he been alive. That it was a case in which the doctrine of relation was peculiarly applicable, there being no strangers or third persons whose interests could be affected by it. That doctrine, continues the court, is this: Where there are divers acts concurrent to make a conveyance estate or thing, the original act shall be preferred, and to this the other act shall have relation. That the principle has been repeatedly recognized, that a deed executed in pursuance of a previous contract for the same premises, is good by relation, from the time of making the contract, so as to render invalid every intermediate sale or disposition of the land by the grantee. That the consideration money was paid by the purchaser. He had done everything to entitle him to a deed. The money must be

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presumed to have been paid over by the sheriff to the plaintiff in the execution in satisfaction of the debt. That the essential and important part of the sheriff's duty had then been performed, and nothing remained but the formal act of delivering the deed, the purchaser having been in possession, as we have a right to presume from the day of sale. The lapse of time under such circumstances, and between these parties, can afford no objection either to the validity of the deed or to its relation back to the time of sale.

The facts presumed by the court in the case just cited, are in evidence in this case. The purchase money was paid by Gamble; it was paid over by the sheriff, and Gamble took possession of the lot shortly after the redemption had elapsed. So the only material difference between the case cited and that now before us, consists in the character of the parties to the suit. In the case cited the relation of the deed to the time of the sale affected a privy, in this case a stranger is affected. The doctrine is, that in *fictione juris, semper existit equitas*. Relation can only affect parties or privies, and not strangers. It is a general rule with respect to the doctrine of relation, that it shall not do wrong to strangers; Case vs. Digoes, 3 Caines 262; Jackson vs. Bard, 4 John. 230. Merry must be regarded as a stranger. Whether he had notice or not, and in what light he would be regarded in another form, we are not now called upon to determine. If one affected with notice should sell to another without notice, would not this involve all the equitable doctrine of notice, and would not a court of law feel itself embarrassed in determining questions of this kind?

It will be observed that no opinion has been expressed, as to the validity of the deeds executed by Brotherton & Brown. Assuming them to be operative, the difficulty above stated would prevent their operation against Merry. As to the suggestion that a party might go into a court of equity for a deed under such circumstances, it seems the statute of frauds would interpose obstacles to a purchaser, who should seek relief without a note or memorandum in writing of the sale. Without undertaking to determine whether the proceedings to obtain a deed from Brotherton were regular, or whether the deed from Brown was effectual, we must say we would be very loth to bring ourselves to the conclusion that there was no remedy in such cases.

The objection to the proof of the deed from Loper to Merry for half the lot in controversy is not noticed, because, there was afterwards a deed to Merry for the entire lot, to which no objections were made.

The other judges concurring, the judgment will be affirmed.

Harrison vs. The State of Missouri.

JAMES HARRISON vs. THE STATE OF MISSOURI.

1. Where a city charter gives the power to the city to license and tax ferries within its limits, unless by the charter an exclusive right be given, the right of the State to license and tax the same ferries, is not taken away.
3. The City of St. Louis has not, by its amended charter of 1843, an exclusive right to license the ferries within its limits.

APPEAL from St. Louis Criminal Court.

LEWIS V. BOGY, for Appellant.

The appellant contends that the city of St. Louis has exclusive jurisdiction by its charter, to license and regulate all ferries within its corporate limits, and refers to the following acts of the legislature: Sec. 2d, 3d art. of act chartering the city, approved the 8th February, 1839; page 160 of session acts, giving the city *exclusive* power within the city to license and regulate the keeping of ferries; and also 2d sec. 3d art. of the charter, approved 15th February, 1841, page 133 of session acts, giving the same power as the charter of 1839; and also the 40th sect. of 3d article of the charter; approved the 8th February, 1843; session acts, page 119, *giving power to regulate and license all ferries within the limits of the city*; (by this last charter the word *exclusive* is left out.)

The act regulating ferries, approved the 26th February, 1835, page 175, R. C., is not in force in the city of St. Louis.

According to the 28th section of the act, concerning revised statutes, page 383, Rev. C., providing that where provisions of different statutes are repugnant to each other, that which shall have been last passed shall prevail. The act of 1835, regulating ferries, is repealed by the subsequent acts of the legislature, giving exclusive power to the city of St. Louis, to license and regulate all ferries within its limits.

If the above positions are correct, it follows that the demurrer to the indictment should have been sustained.

NAPTON, J., delivered the opinion of the court.

The plaintiff in error was indicted by the grand jury of St. Louis county, for keeping a ferry without a license from the county court, as required by the act regulating ferries, approved 26th February, 1835.

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The plaintiff in error had taken out a license from the city authorities of St. Louis, and the only question was, whether on this subject, the ferry being on the Mississippi, at the city of St. Louis, the city had exclusive privileges. Unless there be something in the language of the city charter, to give it such exclusive right of taxation, it would hardly be presumed. The city authorities have by their charter, the power to levy and collect taxes upon all property made taxable by law, for State purposes; they have the power to license, tax and regulate auctioneers, grocers, merchants, &c., and the right to restrain and suppress billiard houses, gaming houses, dram shops, &c., but these powers are subordinate to the powers of the legislature, over the same subjects, and that power has been exercised. According to the charter of 1839, the city authorities were invested with *exclusive* power within the city, to license and regulate the keeping of ferries, but in the charter of 1843, which was in force when this indictment was found, the word "exclusive" is omitted, with the design, as we must presume, of leaving this subject upon the same basis with the other subjects of city taxation.

Judgment affirmed.

COXE ET. AL. VS. WHITNEY.

1. In actions of assault and battery, no matter of provocation can be given in evidence, unless it be so recent as to create a fair presumption that the violence was done under the influence of the passions excited by it.
2. An article in a newspaper published by A. & B., written by A., cannot be read in evidence as an admission of B.

APPEAL from St. Louis Circuit Court.

GEYER for Appellants.

The appellants submit the following propositions:

1st. The plaintiff claimed vindictive damages, and, in the third instruction given, the court says he was entitled to it, thus placing before the jury the motives of the defendants, and "all the circumstances which give character to the assault," as proper for their consideration. The defendants ought to have been allowed to read in evidence, in mit-

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igation of damages, the scandalous article in the Picket Guard, in which the wife and brother of the defendant Coxe, and the near relative of the other defendants, were most brutally assailed.

2d. If the jury were authorized in a civil action to give *exemplary damages*, they ought to have been allowed to consider the facts and circumstances which influenced the defendants, as well those in mitigation, as those in aggravation. Peabody vs. Winchester, 7 Law Rep. 384, (contained in No. 8, for Dec. 1844.)

3d. The evidence offered by the defendants was important to explain and enable the jury to understand, the testimony given by the plaintiff, as to the object of the visit of the defendants, shewing it to have been lawful and proper, and tending to negative the presumption of a pre-concerted design to commit violence, from the fact of their presence.

4th. The court erred in directing the jury, that they might *award exemplary damages*, in proportion to the *malicious conduct* of the defendants; because, first, it assumes the existence of malice; because, secondly, the malice of the defendants is not in any such case the measure of damages, but the injury to the plaintiff; and thirdly, the plaintiff was entitled only to the damages, for the injury done to his person and feelings, and not by way of public punishment. Actions of assault and battery, are not instituted or entertained for the purpose of example, but for indemnity; exemplary punishment, whether inflicted on the person or purse, belongs exclusively to criminal cases.

5th. After excluding from the jury, the consideration of the conduct of the plaintiff, and the nature of his vile and unprovoked libel, it was manifestly unjust, and therefore unlawful to direct and encourage the jury to award *exemplary damages*.

6th. The second article in the Picket Guard, was improperly excluded, because being the joint production of the plaintiff and his partner, it is in law his own, and ought to have been received as his account of the assault, and the causes of it.

7th. The instructions given by the court, assume the commission of an assault, by one or more, and malice on the part of all of the defendants, and indicate the opinion of the court on the facts too plainly against the defendants, and for that reason the judgment ought to be reversed.

8th. The defendants were entitled to a new trial, because of misdirection by the court; and the exclusion of legal and competent evidence; and also because the jury disregarded the second instructions given for defendants, and found their verdict without any evidence of facts material. There being no evidence that an assault was committed by any of the defendants but one, or that either of the others aided or abetted

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the assailant; or that previous to the assault there was a common design to commit such assault, and that it was committed in pursuance of such design. The jury was not authorized, (as the court intimated it was, in the fourth instruction for plaintiff,) to find the existence of a common intent, without evidence.

T. POLK, for Appellee.

In support of the judgment rendered by the court below, the counsel for the appellee, relies upon the following

POINTS AND AUTHORITIES.

1st. The circuit court committed no error in excluding from the jury the article in the Picket Guard, No. 17, of date of 6th September, 1842. At least two days having elapsed between the issuing of said No. and the infliction of the battery. *Avery vs. Ray*, et al., 1st Mass. Rep. 11; *Lee vs. Wolsey*, 19 John. Rep. 319; *Beardsley vs. Maynard*, 4 Wendell, 336; *Maynard vs. Beardsley*, 7 do. 560; *May vs. Brown*, 3 Barn. & Cress. 113, (10 Eng. C. L. Rep. 24;) *Wakely vs. Johnson*, 1 Ryan & Woody, 422, (21 Eng. C. L. Rep. 480,) *Rochester vs. Anderson*, 1 Bibb, 428; and *McAlexander vs. Harris*, 6 Munford, 455.

2nd. The court below ruled correctly in excluding from the jury the article in No. 20 of the Picket Guard, dated the 9th September, 1842. *Finney vs. Allen*, 7 Mo. Rep. 416; 5 Do. 476.

3d. The court below committed no error in the instructions it gave to the jury. 1 Bac. Ab. Title, assault & battery, A & B, p. 243; *Tomlin's Law Dictionary*, assault, 1 Hawkins' Pleas of the Crown, 263; *Halsey, et al. vs. Woodruff*, 9 Pick. R. 555; *Bohnn vs. Taylor*, 6 Con. Rep. 313; 2 *Strange*, 910, 11 Coke's Rep. 5, (abrd. ed. 323;) 5 Burf. 2790, 1 *Strange*, 422; 2 Bac. Ab. Title Dam. D. 4, p. 272; 1 Wils. 30; 6 T. R. 199; 2 *Tidd's Prac.* 805; 9 Pick. Rep. 555; 2 Bac. Ab. Title Dam. D. 1, p. 266; 14 John. Rep. 352; 19 John. Rep. 381; 10 Wend. 654, 7 Mo. Rep. 57; Code of 1835, 343; 9 Bing. 333; 8 Barn. & Cress. 417; 4 Barn. & Ald. 430; 6 Taunt. 460; 12 East. 229; 1 Pick. Rep. 38.

4th. The court below committed no error in overruling the motion made by defendants for a new trial. Code of 1835, page 343, § 8; 9 Bing. 333, (23 Eng. C. L. Rep. 296;) 8 Barn. & Cress. 417, (15 Eng. C. L. Rep. 252,) 4 Barn. & Ald. 430, (6 Eng. C. L. Rep. 475;) 6 Taunt. 460, (1 Eng. C. L. Rep. 452) 12 East 229; 1 Pick. Rep. 38.

Coxe et al. vs. Whitney.

NAPTON, J., delivered the opinion of the court.

This was an action of trespass, assault and battery, brought by Whitney against Coxe, Christy, Mitchell and Schumburg. Each defendant pleaded separately "not guilty," and a separate plea of *son assault demesne*. To these pleas, replications were filed, traversing the pleas and the issues taken were tried at the last April term of the St. Louis circuit court. The plaintiff had a verdict and judgment against all the defendants for sixteen hundred dollars.

The plaintiff Whitney was the editor, or one of the editors, of a newspaper printed in St. Louis, called the "*Picket Guard*;" and was also an engraver, and took daguerreotype likenesses, at a room in the second story of a house at the northeast corner of Market and Fourth streets. This was also his lodging room. On the 6th September, 1842, an article appeared in the *Picket Guard* reflecting upon the wife of Coxe, one of the defendants; the other defendants being nearly connected by blood or marriage with Mrs. Coxe. On the 8th, the defendants went to the room of the plaintiff, and made the assault complained of. No person was present at the commencement of the assault. The first words heard by a witness, who had been attracted to the spot by the cries of murder, were from one of the defendants. "We asked him to sign this, and he refused." To which Whitney replied, "I wanted to make some alterations before I signed, and they struck me." Some one asked Whitney why he did not defend himself, to which he replied, "he had no weapons." The defendant, Christy, swore he would have satisfaction, and attempted to strike Whitney with a knotted varnished hickory cane, but was prevented. A pistol was also seen in Christy's possession.

Whitney was badly hurt, having received several wounds on his face, nose, head and ears, which occasioned great effusion of blood, and temporary deafness in one of his ears. He was confined to his bed for a fortnight, by the severity of his wounds.

On the part of the defendants, it was proved, that Coxe was the President of the Mutual Insurance Company, whose office was at the corner of Main and Locust street, and whose residence was *up town* from the place where the *Picket Guard* was printed. The defendants then proposed to read the article printed in the *Picket Guard*, on the 6th September, and which was understood to reflect upon the wife and brother of said Coxe, as follows: "Another Affair. We learn that the wife of an officer of one of our public institutions, residing *up town*,

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was sent from home last evening by her husband, in company with her *gallant*—the lady having given very unequivocal evidence of her preference for her new lover. The gentleman with whom she left, has been, as we learn, a resident in the family during some months past. 'Tis said they left the house arm in arm, with the most perfect resignation and nonchalance."

This paper was not admitted to go in evidence. The defendants then proposed to read another article from the same paper published on the 9th September, which was written by the co-editor of the said paper, and which purported to give plaintiff's own account of the assault made by the defendants. This also was excluded.

All the instructions which were asked on either side were given. A motion was made for a new trial but was overruled, and the case is brought here by appeal.

The principal ground upon which the plaintiffs in error rely for a reversal of this judgment, is the exclusion from the jury of the defamatory article published by Whitney a day or two before the assault. This libel, it is contended, should have gone to the jury, not as a justification of the assault, but as an outrage upon the feelings of the defendants, calculated to mitigate the damages. A number of authorities are cited by the defendant in error to show that facts and circumstances which took place previous to the assault complained of, have never been regarded as evidence in mitigation of damages.

In *See vs. Woolsey*, (19 J. R. 321) Judge Spencer says, that in an action for assault the evidence of provocation which is allowed to mitigate the damages, must be so recent "as to induce a fair presumption that the violence was done during the continuance of the feelings and passions excited by it. On any other principles the law would countenance the most revengeful feelings, and indirectly also an appeal by persons conceiving themselves injured to force and violence." The court, therefore, approved of the action of the circuit judge in excluding from the jury a defamatory paper written by the plaintiff, which had come to the defendant's hands but a few days previous to the assault, and also insinuations made by the plaintiff orally, derogatory to defendant's character, which came to his knowledge the evening before the assault.

The same doctrine has been applied by the same court to suits for libel, in the cases of *Beardsley vs. Maynard*, 6 Wend. 337, and *Maynard vs. Beardsley* 7 Wend. 560. This is also the doctrine of the English courts; 3 Barn & Cress, 113; 1 Ryan & Moody, 422.

In *Rochester vs. Anderson*, (1 Bibb, 429) Judge Boyle states with

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sufficient precision, the principles by which courts of law are governed in matters of this sort. "The law, out of respect to the frailty of human passions, may look with an eye of some indulgence upon the violation of good order, produced in the moment of irritation and excitement from abusive language. But where there has been time for deliberation, the peace of society requires that men should suppress their passions, and neither reason or law will suffer them to claim a diminution of their responsibility for their misconduct. If opprobrious words, for which the law allows an action, have been used of a man, the law furnishes a remedy, and will not permit him to redress his own wrong. If they are so frivolous as not to be deemed by the law actionable, a peaceful citizen, when he has had time for reflection, will consult the peace and good order of society, as well as his own dignity, in disregarding them.

What, therefore, is done under the influence of a passion provoked by the opposite party, at the time of the assault, is proper to be considered by a jury in extenuation of the offence. But *ira furor brevis est*: what is done twenty-four, or forty-eight hours after the provocation received, is not the result of that passion, but is the deliberate infliction of vengeance for an injury real or supposed; and this spirit of retaliation, however consonant it may be to the customs of society, the law does not countenance or tolerate.

We have been referred to the case of Peabody vs. Winchester, lately decided in Boston, and reported in the 8th No. of the 7th vol. of the Law Reporter, in which Judge Wilde is reported to have laid down a very different doctrine. The opinions attributed to Judge Wilde in this case, are certainly very different from those entertained by the supreme court of Massachusetts in the case of Avory vs. Ray, 1 Mass. Rep. 11.

As to the refusal of the circuit court to permit the article in the 'Picket Guard' of the 9th of September, purporting to give an account of the assault upon the plaintiff, to be read, we think there was no error in this. The article was proved to have been written by the plaintiff's co-editor, and not by the plaintiff. It was therefore no statement or confession of the plaintiff's. If designed to prove the statement as a confession by the plaintiff, the writer should have been called as a witness. As a mere statement or confession by a co-editor or partner, it could not bind any one but the person who made it.

Judgment affirmed.

Rutledge & Farrar vs. Moore.

RUTLEDGE & FARRAR vs. JOHN P. MOORE.

1. An acknowledgment of a debt, though it consist of a single item, will sustain a count upon an account stated. But the acknowledgment must be of a sum certain, and absolute and unconditional, not contingent or qualified.
2. Where a wood boat had been sunk by the mismanagement of the captain of a steam boat, a promise to replace it with another, or the failing so to do to pay one hundred and fifty dollars, will not sustain a count upon an account stated.

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LEONARD & BAY, for Plaintiff in Error.

POINTS AND AUTHORITIES.

1. The promise of the defendant to pay the money for the wood boat, if he should fail to replace it, was proper evidence under the count for an account stated.

If a fixed and certain sum is admitted to be due to a plaintiff, for which an action would lie, it will be evidence to support a count upon an account stated; 1 Chitty's P. 391.

2. Where a party admits that there is something due by him to another, and promises to pay the amount due, assumpsit will generally lie, although the subject matter of the demand is founded in *tort*; Chitty on Contracts, 18, 19, 20; 1 Chitty's P. 113, 14.

3. The instruction of the court took the whole case from the jury. It was the duty of the court to declare to the jury the law arising on the evidence, and not to direct them to find a verdict for the defendant. Instructions of this character have a tendency to confound the law and the facts; besides the instructions took away the right of the jury to decide upon the facts; Morton vs. Reed, 6 Mo. Rep. 73; Glasgow & Harrison vs. Copeland, 8 Mo. Rep. 268.

J. B. WALKER, for Defendant in error.

POINTS.

1. The defendant contends that there was no error in the decision of the court excluding the testimony contained in the depositions, because no part thereof sustained or tended to sustain any cause of action set forth in the declaration; therefore it was properly excluded.

2. There was no error in the instruction given by the court to the jury

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after having excluded the said testimony, because there was no other evidence in the cause tending to support any cause of action contained in the declaration, and the jury being obliged to receive the law from the court, could not have found otherwise.

There was no error in the refusal of the court to set aside the verdict or grant a new trial, because the verdict was according to law and evidence.

Scott, J., delivered the opinion of the court.

This was an action of assumpsit: the declaration contains only the common counts.

On the trial the plaintiff proved that the defendant, Moore, was the master of a steam boat called the Eclipse, which ran in the Mississippi, and was registered at St. Louis. The plaintiffs also read to the court the depositions of several witnesses, the object of which was to show that some time in the year 1842 a flat boat, belonging to the plaintiffs, having been attached to the steam boat Eclipse with a load of wood, was, through the mismanagement of the defendant sunk and lost in the Mississippi river. The depositions further proved, that shortly after this occurrence the plaintiffs called on the defendant, and asked him if he intended to pay them for the wood boat, to which Capt. Moore replied, by enquiring how much said wood boat was worth. The plaintiffs replying that the boat was worth one hundred and fifty dollars. Capt. Moore said he thought it was high, but that he would procure a wood boat and with it replace the one that was lost; if he failed to do this on his downward trip he would bring up one on his next trip from New Orleans; and if he failed to do this, he would then pay the money for the wood boat.

This being all the evidence, the defendant moved for its exclusion on the ground of irrelevancy; which motion the court sustained. The plaintiff refusing to take a non-suit, the court thereupon directed a verdict for the defendant. A motion for a new trial was made and overruled, and exceptions were taken to all the opinions of the court.

The only count to which the testimony contained in the depositions could have had any application, was that upon an account stated.

An acknowledgment of a debt, though it consists but of a single item, will support a count upon an account stated; Knowles vs. Mitchell, 13 East, 249; Highmore vs. Primrose, 5 Maule & Selw 65. But the admission must be of a sum certain, and it must be absolute and unqualified, not contingent or alternative; 1 Leigh. N. P. 99; Evans vs. Verity,

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Ryan & Moody, 239. Allowing the answer of the defendant, when informed by plaintiffs of the price of the boat, to be an admission that the boat was worth one hundred and fifty dollars, still the promise to pay that amount, if there was such a promise, was contingent upon the defendant's failure to replace a similar boat; either on his downward or upward trip. Such a promise, if it had been declared on specially, could not have been averred as a simple, unconditional promise, but must have been stated in the alternative; Hatch vs. Adams, 8 Cow. Rep. 35. Moreover, there was no evidence whatever that the defendant had not complied with his agreement in replacing the boat.

The testimony, therefore, was properly excluded; and having been so excluded, and there being no other evidence, the court properly directed a verdict for the defendant.

Judgment affirmed.

RYAN vs. RYAN.

In a suit brought by a husband against his wife for divorce on the ground of habitual drunkenness for more than two years, the wife may recriminate, that he has been guilty of adultery. And such fact being found will prevent his getting a divorce.

APPEAL from St. Louis Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was a suit for a divorce commenced by Patrick Ryan, against his wife Mary Ann Ryan. The petitioner charges that his wife for more than two years had been guilty of habitual drunkenness, and also charges her with cruel and barbarous treatment, such as to endanger his life and the peace of his family.

In November, 1843, Mary Ann Ryan filed her answer and cross bill, admitting the marriage and denying the good conduct of the plaintiff. She charges him with having committed adultery with one Emily Montague, and with others not named. She charges him with inflicting on her a loathsome disease, from which she still suffered, and with having turned her out of his house, and refused her maintainance.

A jury was summoned to try the issues submitted to them, and found the following: 1. That the said Mary Ann has been addicted to

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habitual drunkenness for the space of more than two years. 2. That the said Mary Ann has not been guilty of cruel and barbarous treatment towards said plaintiff, as charged in his bill. 3. That said Patrick has been guilty of adultery with Emily Montague, as charged in the answer.

The complainant applied for a new trial on the third issue which the court granted.

Meantime the court at the instance of the defendant, made an order allowing her a small sum for maintenance, *pendente lite*.

The result of the second trial was the same as the first, and a motion for a second new trial was overruled.

At the June term, 1845, the case came up for final hearing, and the court found that the said defendant had been addicted to habitual drunkenness for the space of more than two years, and further, that said defendant had not been guilty of cruel treatment, &c., as charged, and further found, that said complainant had been guilty of adultery with Emily Montague, and it appearing from these facts that said complainant is not entitled to the relief prayed, his bill is dismissed with costs.

On the hearing, the complainant asked the court to declare the law to be, that adultery cannot be recriminated as a bar to divorce, except when adultery is charged in the bill; that no offence can be recriminated except one of a similar kind to the one charged; and that the words "innocent and injured party," used in the statute, mean only that the party should be innocent of any offence which could be set up as a bar; consequently that this complainant was entitled to his divorce, notwithstanding the finding of the jury on the issue of adultery.

These instructions, if they may be so termed, contain the positions, we presume, upon which the appellant relies for the reversal of the decree of the circuit court.

The question is one of mere statutory construction; and the statute is a peculiar one. But little aid can be expected from adjudged cases.

In New York, divorces *a vinculo matrimonii*, are only granted for adultery, and there the right of the party sued, to recriminate, is conceded, but it must be an offence of the same character. Hence a condoned adultery cannot, as the courts of that State hold, be revived by cruelty or other offence, short of a repetition of the adultery. *Johnson vs. Johnson*, 4 Paige 460. *Ib.* 14 Wend. 644. In the English ecclesiastical courts, the *compensatio criminum* of the cannon law is adopted, and the party sued is permitted to recriminate not only charges of the same nature, but others of a different character, and im-

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plying a different degree of guilt. It is not, however, to be understood where charges of a different and lesser degree of guilt, such as cruelty and desertion were set up, in opposition to a suit for divorce on the ground of adultery, that such charges constituted *per se* a bar, in those courts. In *Forster vs. Forster*, (1 Hagg C. R. 144) the defence of the wife, from whom the husband was seeking a divorce, consists first, of a denial of her guilt; second, a recrimination of similar misconduct on his part; and third, unkind treatment of the husband. In relation to this last plea, Sir William Scott says: "A third plea of defence offered, but with less effect, is, that his treatment of his wife was, as it really appears to have been, marked with unkindness and disaffection. I say with less effect, because if the course of unkindness was such as the law would notice, the remedy is not that to which she has unhappily resorted, but an application to this court for the protection of a separation by reason of cruelty. And if the ill treatment is not of that gross kind, against which the law would not relieve in this form, still she is not to find her remedy in the contamination of her own mind and person, but in the purity of her own conduct, and in a dignified submission to an undeserved affliction. At the same time though such a plea has no absolute effect, it has a very proper relative effect, when infidelity on the part of the husband is likewise charged; because it adds greatly to the probability that such a charge is well founded, if it appear that his affections were visibly estranged from his wife, and therefore more likely to be diverted to other less worthy objects."

The case of *Chambers vs. Chambers*, (1 Hagg C. R. 439) further illustrates the light in which these minor recriminatory charges are viewed by the English ecclesiastical courts. In this case, the wife set up in bar of the divorce sought; 1, Connivance on the part of the husband; 2, Collusion; 3, Adultery committed by him; and 4, Cruelty. In relation to the last defence, Sir William Scott observes: "On this plea the question might arise, whether a party would be entitled to bar her husband from his remedy of divorce, for adultery proved against her by the plea of cruelty? I am inclined to think that she would not. It is certain that a wife has the right to say—"you shall not have a sentence against me for adultery, if you are guilty of the same offence yourself." The received doctrine of compensation would have that effect, because both parties are *in eodem delicto*; but this is not so in recrimination of cruelty; the *delictum* is not of the same kind. If the wife was the *prior petens* in a suit of cruelty, I do not know that she would be barred by a recrimination of that species; for the consideration would be very different; the court might not oblige

her to cohabitation which would be dangerous. Here the husband is the *prior petens* in a suit of adultery, and I take the general doctrine to be, that a wife cannot plead cruelty as a bar to divorce, for her violation of the marriage bed."

In *Beeby vs. Beeby*, 1 Hagg 789, and *Astly vs. Astly*, 1 Ib. 714, the same construction is given to the *compensatio criminis*, where it is set up as a plea in bar. In the former case, the Judge observed, that such a plea was "a set-off of equal guilt on the part of her husband. The doctrine that this, if proved, is a valid plea in bar, has its foundation in reason and propriety; it would be hard if a man could complain of the breach of contract which he has violated; if he could complain of an injury, when he is open to a charge of the same nature."

From these cases it may be inferred that the *compensatio criminis* of the canon law, as enforced in the ecclesiastical courts of England, is not a mathematical rule, which operates uniformly the same way, without regard to the circumstances and character of the original charge, or that of the one recriminated.

Adultery is conceded to be a plea in bar to a divorce, sought by the party who has been guilty of it, notwithstanding the opposite party has been guilty of the same offence. But it is strongly intimated in the cases to which we have referred, that the offence set up by way of plea in bar, must be of a similar kind to the one charged. It is true that where a condonation is pleaded as a bar to the divorce sought, the complaining party may show the commission of offences subsequent to the condonation of a character different from the one pardoned or condoned, for the purpose of reviving the original offence, so as to authorize the divorce. And this doctrine, which is not the law in New York, appears to have led to the incorrect note in Kent's Commentaries, (vol. 1, page 101, note a,) which states that the English ecclesiastical courts do not require the recriminatory charge *in bar* of the suit, to be of the like character.

Our statute is not like the New York law, where adultery is the only ground upon which a divorce *a vinculo matrimonii* can be sought; but its provisions bear more analogy to the principles by which the English ecclesiastical courts are governed, in granting divorces *a mensa et thoro*. By our statutes, however, a divorce *a vinculo matrimonii*, may be procured for causes, which by the canon law, would not have authorized a divorce *a mensa et thoro*; as for instance, desertion for two years, which in the ecclesiastical courts, so far from being a ground of divorce, was rather regarded as an objection to granting one, in cases where, but for this fact, the causes were amply sufficient. These

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courts viewed a separation of this sort, either as voluntary, and therefore evidence of collusion; or if not voluntary, on both sides, as a species of *laches* on the part of the injured party, in failing to bring the matter in proper time before that tribunal whose power and province it was to decree a restitution of marital rights, or to effect a legal separation, as the circumstances of the case might warrant. In addition to impotency, precontract and adultery, which according to every code of which we have any knowledge, are the principal, and in many, the only grounds for a divorce, either a *vinculo*, or a *mesna et thoro*. Our statute gives the same effect to a willful desertion for two years, a conviction of felony or other infamous crime, habitual drunkenness for two years, cruelty, and indignities to the person, which are intolerable. In all these cases, the "innocent and injured party," is declared entitled to a divorce, *a vinculo matrimonii*.

The question then arises, do the words "innocent and injured party" introduce or adopt, the *compensatio criminis* of the canon law, and if so, must the complaints be *in pari delicto*, as in the case of mutual adultery, or may any one of the enumerated offences be set off against any other charged, however different in character or degree?

So far as adultery is concerned, the question is easily answered, for the fourth section provides that where both parties have been guilty of adultery, no divorce shall be decreed. If then the husband, seeking a divorce on account of the adultery of the wife, is barred by the plea of adultery committed by him, he is surely equally barred, where his wife is only charged and convicted of a minor offence, one less derogatory to the obligation of the marriage contract, and which may have been induced by the neglect, misconduct, or cruelty of the husband. Had the wife been guilty of adultery, she could have pleaded the adultery of her husband in bar of a divorce. Shall she be denied this defence when her crime is less?

To apply this principle throughout, and allow a recrimination of offences dissimilar in their nature, and in their effects, in every instance, is a matter about which some hesitation might be felt, and which at all events we may pass over until a case arises which requires its decision. Would the husband, who seeks a divorce for the adultery of his wife, be barred by a recrimination of drunkenness or cruelty, or indignities to the person? Or would the wife who asks a divorce on account of cruel and barbarous treatment, be prevented from getting such divorce by reason of her adultery or drunkenness? It has been seen that in the ecclesiastical courts, the cruelty of the husband would not prevent his getting a divorce where his wife had been guilty of

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adultery. Nor is it clear that in those courts, a wife would be barred of her divorce for cruelty, by reason of her having been guilty of adultery. *Best vs. Best*, 1 Adams 411, note —. But whether these rules drawn from the cannon law, and acted on by the ecclesiastical tribunals of England, in whom the power of granting a divorce *a vinculo matrimonii* did not exist, ought to be applied in the construction of our statute is worthy of grave consideration.

The judgment of the circuit court in this case will be affirmed.

THOMAS S. WARNE vs. RUSSELL PRENTISS.

1. A witness who has no legal interest in the event of a suit, is competent, although he may expect to be benefitted by the judgment. His interest must be a direct and certain legal interest and not contingent.
2. In an action for use and occupation under our statute, a parol demise is evidence of the *quantum* of damages.

ERROR to St. Louis Court of Common Pleas.

PRIMM & TAYLOR, for Plaintiff in error.

Of the errors assigned, the plaintiff relies on the following:

1st. The court erred in not permitting Bredell to be sworn in chief. If interested at all, his interest was such as went to his *credibility*, not to his *competency*.

2d. The court erred in the instruction which it gave to the jury.

That instruction states no legal proposition, to which the jury may apply the facts, but on the contrary, assumes to decide upon the force of the testimony, and the applicability of the law to them. It takes the whole case away from the jury. *Morton vs. Reed*, 6 Mo. Rep. 6; *Glasgow vs. Copeland*, 8 Mo. Rep. 268; *Thompson vs. Botts*, 8 Mo. Rep. 710.

3d. The court erred in not permitting the attorney for plaintiff to address the jury upon the case made.

4th. The court erred in not granting a new trial. If the two first points are correct, then this point also must be maintained.

Warne vs. Prentiss.

CROCKETT & BRIGGS, for Defendant in error.

POINTS AND AUTHORITIES.

1st. That Bredell, offered as a witness by plaintiff, was interested in the suit, and therefore properly excluded. 1 Greenleaf E. 460-1; 2 Esp. C. 735; 1 Starkie Ev. 103, 105, and notes; 1 Dal. Rep. 62; 2 Pick. 240.

2d. That plaintiff cannot recover on his first count, because of a variance between the special contract declared upon, and the one given in evidence, nor on the common counts, because there was a special agreement. 8 Mo. Rep. 118, 517.

3d. That there being a variance on the first count, and no proof applicable to the others, the court properly directed the jury to find for defendant.

4th. The court having instructed the jury that it was their duty to find for defendant, properly refused to permit plaintiff's counsel to address the jury.

NAPTON, J., delivered the opinion of the court.

Warne sued Prentiss, in assumpsit, for the use and occupation of a house and lot in St. Louis. The declaration contained four counts; the first averred a special contract, by which a tenancy was created under Warne, from the 12th July, 1841, to the 12th October, 1843, at a rent of one thousand dollars per annum, payable quarterly, in consideration of which tenancy, defendant undertook to pay the rent punctually; that the defendant had occupied the premises until the 12th October, 1842, yet the said defendant not regarding his promises, &c., had failed to pay said rent, &c.

The second was a count for use and occupation.

The pleas were non-assumpsit, set off and payment, to all of which replications were filed, and issues taken. The issues were found for the defendant, and judgment was given accordingly.

It appears from the bill of exceptions that the plaintiff, on the trial, offered as a witness in his behalf, Edward Bredell, who, being sworn on his *voire dire*, testified that he did not know that he had any interest in the result of this suit; that he had a claim against the said plaintiff, who had failed in business some years ago, but his claim against the plaintiff was secured to be paid to him collaterally, by securities, which were perfectly satisfactory to him, and that he did not rely upon the termination of this suit favorably to the plaintiff as a means of paying his

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claim; but that he was willing to receive the payment of his claim from this source, or any other that the said Warne might command; that a judgment in favor of the plaintiff in this cause might make him more able to pay said Bredell's claim; but that he, Bredell, at all events considered himself secured; that some two years ago, in a casual conversation with Warne, he was told by Warne that this suit had been commenced, and that if he succeeded in obtaining a judgment, he would assign the judgment to witness to pay his claim; that since that time witness had not seen Warne, and that no such assignment was ever made. It was a mere verbal promise by Warne to appropriate the proceeds of the judgment in this case to the payments of the debts due witness. The witness did not know whether Warne was insolvent.

The court excluded the witness as incompetent, and the plaintiff excepted.

The plaintiff then read to the jury, after proving the signatures of the parties, a written lease, not under seal, from Warne to Prentiss, by which the premises therein described were leased to said Prentiss from July 12th, 1841, to October 12th, 1843, upon a rent of one thousand dollars per annum, Prentiss contracting to pay his rent punctually, and agreeing not to underlet without the consent of Warne or of Edward Bredell, and not to occupy the premises as a drug store.

The plaintiff also gave in evidence a lease, under seal, from Edward Bredell to plaintiff, from 12th October, 1840, to 12th October, 1843, in consideration of a rent of one thousand dollars per annum, and with similar stipulations, as to sub-letting, as were contained in the lease from plaintiff to defendant.

The plaintiff then introduced witnesses who testified as to the occupancy of the premises by the defendant; the length of time such occupancy continued, and the yearly value of the premises at the time they were so occupied. No testimony was given by the defendant, but the court, at the instance of the defendant, directed the jury to find a verdict for the defendant? To this, exceptions were taken.

Two points are presented by the record; first, the competency of Edward Bredell; and second, the propriety of directing a verdict for the defendant, on the state of facts before the court.

First. It is a rule of evidence, that a creditor shall not be admitted as a witness in behalf of his debtor, to increase or preserve a fund out of which he is *legally* entitled to be paid. In some of the cases, the rule has been applied more broadly than it is here stated, but the reason of the rule, as well as the decided preponderance of mere authority, is in favor of strictly limiting its applicability to cases where the creditor

has a legal interest in the fund, and not a mere expectation of benefit. To hold otherwise, would be to produce a disqualification by an interest remote, indirect and uncertain, and thereby run counter to the leaning of courts in modern times, to let objections of this character go rather to the credibility than the competency of the witness.

A reference to some of the principal cases decided on this point, will illustrate the propriety of adhering to the narrow grounds of disqualification, produced by a legal interest in the fund to be created or enlarged.

The case of *Peyton vs. Hallet*, 1 Caines 379, is a case where the witness was held incompetent on this ground, adopting the principle decided in the case of *Powell vs. Gorden*, (2 Esp. 755.) It was an action upon a policy of insurance, and the witness objected to was a creditor of the plaintiff, and had received an order on the plaintiff's agent, to be paid out of the sum to be recovered in this action, but the agent had not accepted the order, though he promised the debt should be paid out of it, and the witness expected to be paid accordingly.

The witness added that as his right did not depend upon the event of this suit, he should look to the plaintiff for payment, whether he recovered in this suit or not. The majority of the court held the interest of the witness to be direct and immediate in the event of the cause. They considered the order which the witness had obtained upon the agent who had control of the suit, as an assignment of this specific property, and the witness' right to look to the plaintiff for payment at all events, whether he succeeded or failed in the action, did not, in the opinion of the court, at all affect or diminish his interest. The chief justice (Lewis) dissented. The case must rest upon the ground upon which the case of *Powell vs. Gorden* does, and thus far is still unshaken; but some of the doctrines cited with approbation in the opinion, in relation to mere expectations or belief of interest, are not now considered law.

In the case of *Marland vs. Jefferson*, (2 Pick. R. 241,) the witness was the auctioneer or commission merchant to whom the plaintiff had sent the goods to be sold, and the witness had advanced money to the plaintiff to near their full value, and the plaintiff was insolvent. The witness stated that he had other security, but did not know whether it was sufficient or not; he did not claim any lien upon the goods, but it was his intention to retain their proceeds, if they came to his hands; and as agent for the plaintiff, he had spoken to the attorney to commence this suit. The witness was held incompetent. Parker, C. J., seemed to rely upon the facts, that the consignor, (the plaintiff,) was insolvent,

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that the witness caused the suit to be commenced, and the money when made would be retained by him on account of his debt. This is a strong case of apparent, as well as actual interest, but not of any *legal* interest which ought to disqualify a witness, and the propriety of the decision may very well be questioned.

In *McVeagh vs Goods*, (1 Dallas 62,) on the trial of an information against certain goods illegally imported, a witness who assisted in making the seizure, and who stated his expectation of some compensation, in case of their condemnation, was held incompetent.

And in *Junis vs. Miller*, (2 Dallas 50,) where a creditor of the defendant stated that he expected if the defendant succeeded, to be paid at least a part of his debt, his testimony was rejected as incompetent. The authority of these decisions is questionable, later decisions of the same court do not conform to them, and the weight of authority elsewhere, is decidedly against such a doctrine. *Todd and others vs. Boon county*, 7 Mo. Rep. 434.

In *Ten Eyck vs. Bill*, (5 Wend. 55,) the supreme court of New York recognized the authority of *Peyton vs. Hallett* and *Powell vs. Gordon*, but held that the interest of the witness must be direct and certain, not contingent, and therefore where the witness had the *promise* of an order for the amount in controversy when recovered, such promise was not held to disqualify him. The court admitted that the bias of the witness might be, in reality, as great where he confidently expects the money when collected, to be applied to his debt, as where he has a power of attorney, (which was the case in *Powell vs. Gordon*,) or a written order, such as existed in *Peyton vs. Hallett*. The court, however, distinguished these cases from the one before them, by pointing out a difference between a specified lien, which the witness would have on the fund when created, and a mere expectation growing out of a verbal promise. This distinction is also recognized, and the principle decided in this case of *Ten Eyck vs. Bill*, fully sustained by the case of *Seaver vs. Bradley*, 6 Gre. 60.

Bredell then having no *legal* right to be paid out of the fund, for the creation or preservation of which he was called on to testify, and being moreover entirely free from any apprehension of loss, let the suit go as it might, on account of the insolvency of Warne, was a competent witness.

The remaining question presented by the record, is the instruction of the court of common pleas to the jury. The reversal of the judgment on account of the rejection of the witness Bredell, renders any particular investigation of this point unnecessary. As the case goes back for

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a new trial, however, we deem it not amiss to state that we have not been able to ascertain any ground upon which the direction of the court of common pleas can be maintained.

It has been suggested that the lease from Warne to Prentiss was not competent evidence under the first count, because of a material variance, and it could not go in evidence under the counts for use and occupation, upon the general principles of pleading, which preclude a party from proving a special agreement under the common counts. If any material variance existed, we have not, upon inspection of the record, been able to discover it; it cannot be pretended that Warne was bound to set out the whole contract, when he only sought to recover for the breach of so much of it as enjoined the punctual payment of rent. Such parts of the lease, as imposed certain other duties on Prentiss, as he did not complain of any breach in these particulars, he was under no obligation to set out in his declaration.

But conceding that the lease was no evidence under the first count, and the objection relied on below, may have escaped our attention, upon what principle shall it be excluded from the jury as evidence under the counts for use and occupation? In an action for use and occupation the statute expressly gives the plaintiff the privilege of showing a parol demise, as evidence of the quantum of damages.

The lease from Bredell to Warne, it is true, was not admissible, but it is not perceived what that lease had to do with the case.

But there was oral proof of occupancy, and of the value of the rent, and it belonged to the jury to determine its sufficiency, provided it was competent and legitimate proof under the issues.

Judgment reversed and cause remanded.

 WALTON vs. WITHINGTON'S ADM'R.

Where a mortgagee takes possession of the mortgaged premises, the rents and profits of the land, are to be applied to the payment of both the principal and interest of the mortgage, and not to the payment of the interest alone. The mortgagee is a mere trustee, and can make no profit out of the estate.

ERROR to St. Louis Circuit Court.

GAMBLE & BATES, for Plaintiff.

The only questions to be presented are—

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1st. Can the profits of the land be set off against the principal, as well as the interest of the debt?

2nd. A question of fact only, which was not disputed in the circuit court. Do the answers and the testimony as saved, show that the profits of the land did equal or surpass the debt and interest?

3d. The sheriff's return on said execution was unlawfully excluded from being given in evidence.

NAPTON, J., delivered the opinion of the Court.

James Withington mortgaged to his father Thomas Withington, a tract of land to secure a debt of \$500; and the mortgagee, Thomas, took possession and enjoyed the rents and profits. After James Withington's death, his interest in the land was sold by order of the probate court of St. Louis, and Samuel Walton became the purchaser at the price of \$1200. Subsequently the administrators of Thomas Withington sued upon the mortgage, and made Samuel Walton a party defendant, and obtained a judgment of foreclosure and order of sale, to pay the principal and interest of the debt, and issued a special *feri facias* thereon. Whereupon Samuel Walton exhibited his bill to the circuit judge of St. Louis county, for an injunction, on the ground that the rents and profits derived by Th. Withington and his representatives since the death of said Thomas, from the land so mortgaged, exceeded the amount of principal and interest for which the land had been mortgaged. It appeared from the record, that Samuel Walton, the complainant, had not been served with notice in the suit for the foreclosure. The judge granted the injunction as to the interest, but refused it as to the principal; and upon the final hearing, made the injunction perpetual as to the interest, and dismissed the bill as to the principal.

This decree appears to have been based upon the idea that the rents and profits of the land could only be set off against the rents and profits of the money, and not against the principal debt. This opinion is erroneous, as the mortgagee holds the estate as a mere trustee, for his indemnity only, and cannot make any gain or profit out of the estate. 4 Kent. Com. Holdridge vs. Gillespie; 2 John. Ch. R. 30.

The decree of the circuit court is therefore reversed, and the cause will be remanded for further proceedings.

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LECOMPTE vs. WASH ET AL.

1. The stat. of West. 2, concerning dower, was never in force in the Territory of Missouri; its provisions were incorporated into the law of this State in 1825.
2. A petition for the assignment of dower, alledging that the husband died *seized* of the land, and that his estate was an estate of inheritance, sufficiently describes the character of the husband's title, as a freehold of inheritance.
3. Where there are several defendants in a real action, as in a petition for the assignment of dower, a verdict in favor of one defendant upon his separate plea, will not avail another defendant, against whom a judgment by default has been rendered.
4. Where the verdict, upon the issues joined on several pleas in bar to a petition for dower, found that the petitioner had left her husband, and lived in adultery, with one L., but had not left her husband and lived in adultery with L., since 5th Feb. 1825, and did not find whether the petitioner had ever been *reconciled* to her husband, the court could render no judgment, but must award a repleader.

ERROR to St. Louis Court of Common Pleas.

LAWLESS, HILL & HAMILTON, for Plaintiff.

SPALDING, for Defendants.

POINTS.

1. The question of the sufficiency of the first additional plea does not arise in this case; and, even if it did, the plea embraces a good defence. 2 Bac. Abr. 384; Rev. Code 1825, p. 334, sec. 7; do. p. 500, sec. 13. And, by the Spanish laws, the widow forfeited her right to the acquisitions made by the husband during marriage, by elopement and adultery. See Dupondan's opinion.

2. The motion of Wash was rightly sustained, as the success of his co-defendant on the issue enures to his benefit.

3. Under the third error assigned, nothing can be taken advantage of but error in the record proper. The failure by the court to sustain a motion, or any error committed by it on the trial, cannot be noticed under this assignment of errors.

NAPTON, J., delivered the opinion of the court.

Hyacinth Lecompte, and his wife Cecile, filed their petition in the circuit court of St. Louis, for an assignment of dower to said Cecile, in the lands of her first husband, Antoine Bisette. The petition stated

that the maiden name of the demandant was Cecile Compare; that in the year 1806, she married Antoine Bisette; that said Bisette was seized of an estate of inheritance in the undivided third part of a lot of ground near St. Louis, two and a half by forty arpens, in the Big Prairie, bounded by lands of the widow Dodier, and of the widow Hebat; that said Bisette, as the demandant was informed, had sold said land in his life-time, but the demandant Cecile had never relinquished her dower; that the said Antoine died in May, 1825, leaving one child, Victoria Bisette; that his widow, the demandant, married Hyacinth Lecompte in March 1829; that defendants, Robert Wash, Brown Cozzens, and Benj. Ames, have entered on said lands, and deforced said Cecile out of her dower, &c., &c.

To this petition, Cozzens and Ames pleaded seperately four pleas, and at the same term, a judgment by default was entered against Wash.

Replications were filed to the first and second pleas, and motions to strike out the third and fourth.

At the November term, 1835, motion was made by Wash to set aside the judgment by default, and it was set aside accordingly. At the February term, 1836, Wash filed several pleas, and Cozzens and Ames filed four additional pleas, their former pleas having been stricken out or withdrawn. These additional pleas were,

1. That after the marriage, said Cecile had voluntarily left the said Bisette, and went away, and continued to live in adultery with the said Hyacinth Lecompte.

2. That during said marriage, said Cecile and said Lecompte compelled the said Antoine to leave the house, and that from that time until the death of said Antoine, she, the said Cecile, voluntarily lived in adultery with the said Hyacinth Lecompte.

3. That after the marriage, and during the life of said Antoine, and after the fifth day of February, in the year 1825, she, the said Cecile, voluntarily left the said Antoine, and went away, and continued to live in adultery with the said Lecompte.

4. That after the marriage, &c., she, the said Cecile, voluntarily left the said Antoine, and went away, and continued with Hyacinth Lecompte an adulterer, until the death of said Antoine, and until after the fifth day of Feb. 1825.

The first, third and fourth of these additional pleas were traversed, and issues taken thereon. A demurrer was filed to the second; which demurrer being overruled, a replication was then filed to that plea, traversing it and taking issue.

"No replications being filed to the pleas of Wash, judgment was given,

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and the case taken by appeal to the supreme court, where the judgment by default against Wash was re-instated.

At this stage of the proceedings, the case was sent to the court of common pleas. On the 29th Nov. 1842, a jury was called to enquire whether the demandant was entitled to dower in the premises in possession of Wash, who found she was entitled to one-ninth of 53 11-100 acres. On the succeeding day, a trial was had on the issues made by the pleas of Cozzens and Ames; and the defendants had a verdict on the first, and the demandant on the second, third and fourth pleas. The demandant thereupon moved for a judgment, *non obstante verdicto*, upon the ground that the first issue was immaterial, and the verdict for her on the last issues authorized a judgment. This motion was overruled. The demandant then moved for a new trial, which was also overruled. The demandant then moved in arrest of judgment, which motion was also overruled. Wash moved in arrest of judgment, because the petition of the plaintiff was insufficient, and because there was upon the record a bar to dower in any lands of the deceased, found by the verdict of the jury on the trial of the issues between the plaintiff, and the other defendants. This motion was sustained.

The principal question involving the merits of this case, is whether the Statute of Westminster Second, 13 ed. 1 ch. 34, was introduced into the Territory of Missouri, by the passage of the act of the 19th January, 1816. The 34th chapter of the Stat. West. 2, provided, that if a woman voluntarily leave her husband, and go away, and continue with an adulterer, she shall forever lose her action to demand her dower, that she ought to have of her husband's lands, if she be convicted thereof, unless her husband willingly, and without the coercion of the church, be reconciled to her, and permit her to live with him, in which event she shall be restored to her action. 2 Co. Inst. 435. This was not the Common Law. 2 Inst 435. The act of Jan. 19, 1816, enacted that the Common Law of England, which is of a general nature, and all statutes made by the British Parliament in aid of, or to supply the defects of the said common law, made prior to the 4th year of James I, and of a general nature, and not local to that kingdom, which said common law and statutes are not contrary to the laws of this territory, and not repugnant to or inconsistent with the constitution and laws of the United States, should be in force in this territory.

Was the stat. of West. 2, made in aid of, or to supply the defects of the common law? Whether a statute has, in the opinion of the court, attained its avowed purpose, or whether its avowed purpose be beneficial or not, are not the questions which determine whether the statute

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is embraced by the provisions of this act of 1816. The legislature did not design that the courts should decide between the relative merits of the common law and the statutory amendments thereof, but doubtless designed to put into operation all such statutes of the British Parliament as purported or professed to be in aid of the common law. The stat. of West. 2 was doubtless of this character, and the objection founded on this point is not tenable.

But the "common law and statutes" must not be "contrary to the laws of this territory." It is necessary then to inquire what were the laws of this territory on this subject when this statute of 1816 was enacted.

In 1807 the first provisions were made on the subject of dower, under the head of wills, descents and distributions. By the 6th section of that law, it is provided that after the payment of debts, the widow of a man who leaves issue shall have a third of the real estate and slaves of decedent for her life, and a third of the personalty *absolutely*. Where the decedent left no issue, she was entitled to one-half of his lands and slaves *during life*, and, upon a certain contingency, one-half of the personalty *absolutely*. And this was declared to be in lieu of dower at common law.

By the act of July 7, 1807, a mode was provided by which the wife could release her dower; and by an act, which passed 18th June, 1808, a provision was made for the widows quarantine, and a mode pointed out by which an assignment of her dower could be obtained.

The act of Jan. 21, 1815, embodied in its provisions all the previous enactments on the subject, making, however, some important modifications of the nature and extent of this estate. By this last law, lands sold under execution, and lands sold in pursuance of a decree of court to foreclose mortgages, are exempt from dower; and the widow, where her husband has died without issue, gets one-half of her husband's lands *in fee simple*, and one-half of his slaves *absolutely*, and all the slaves which came by her, and all the personalty, after the payment of debts. This act also embraced both the previous laws regulating the mode of relinquishing dower, and the proceedings for having it assigned or admeasured.

This was the condition of the law on this subject when the act of 1816 was passed. In 1825 the whole subject was again taken up by the legislature, and, amongst other provisions, this one, taken from the St. of West. 2, by which adultery and desertion were declared a bar to dower, was inserted.

It is very evident from this glance at the legislation on this subject,

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that dower, as it was known and defined at the common law, never did exist in this territory. Previous to 1816 the statute laws of the territory had covered the subject and declared what dower was, and the dower so declared varied most essentially from that which existed at common law. The subject having already been disposed of and provided for, the introduction of the common law, and the British statutes passed in aid thereof, did not repeal or modify, or in any respect alter or affect the rights of persons as they were recognized by our territorial legislation. The enactments of the territorial legislature, and the statute of Westminster Second are not consistent with each other; the enactments having declared *who* should be endowed, and how they should be endowed, and of what. The statute of 13 Edw. 1, creates a temporary bar to the dower, and makes certain acts on the part of the wife a forfeiture of her rights. Whether this statute amended or improved the common law, it at all events applied to a subject previously provided for by territorial legislation, and therefore did not become the law of this State until 1825, when the legislature expressly enacted it.

A variety of questions have arisen in this case, growing principally out of the condition of the pleadings. The one we propose to examine first is the action of the court on Wash's motion to arrest the judgment. This motion was based upon two grounds; *first*, the insufficiency of the demandants petition; and, *second*, the finding of the jury upon the issues between the demandant and his co-defendants, by which it appeared that she was not entitled to dower in any lands.

It seems to be settled that after a judgment on demurrer, there can be no motion in arrest for any exception that might have been taken in arguing the demurrer: the reason of which is stated to be that the matter of law having been already settled by the solemn determination of the court, they will not afterwards suffer any one to come as *amicus curiæ*, and tell them that the judgment given on mature deliberation is wrong, 2nd Tidd. 947, Cresswell vs. Packhan; 6 Taun. 660, Freeman & Snowden vs. Cambden; 7 Mo. R. 298. The principle, however, does not seem to be applicable to the present case. For though the defaulted defendant may be in no better condition, in relation to this subject, than the co-defendants to whose second joint and several plea the plaintiff demurred, yet the co-defendants, whose plea had been sustained by the overruling of the demurrer, had it not in their power, if that demurrer was considered as settling the sufficiency of the petition, to abide by that demurrer, with a view to have the question passed upon by this court. They, therefore, must either have a right to move in arrest, and thereby have the judgment of the court directly on the suf-

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ficiency of the petition, or what, in effect, is the same thing, they have a right to consider the point, if raised by the demurrer, without the aid of a motion in arrest, as a point not waived on their part, by the action of the plaintiff or demandant in withdrawing the demurrer, and pleading over. In either point of view the sufficiency of the petition is a question for this court.

The objection taken to the petition is, that the nature of the husband's title is not set forth so that the court can see whether it be of a dowerable interest. The petition alleges that the husband died seized of the lands described therein, and that his estate was an estate of inheritance. The term *seisen* sufficiently explains the character of the title as a *legal* one, and if it be necessary, in any case, to set out in the petition the nature of the husband's title, whether by grant, concession, survey, &c., it can only be in cases where the interest of the husband was such as, at the common law, would not have entitled the wife to dower. In such case it might be necessary to set forth the nature of the husband's title, so that the court might decide whether it was of a character to make the wife dowerable. Here no such difficulty presents itself: the interest of the husband was a freehold of inheritance, of which he is represented to have died seized.

Our opinion of the sufficiency of this petition renders unnecessary the consideration of the question, somewhat discussed at the bar, in relation to the effect of a judgment by *default* under the provisions of our statute of *jeofails*. We observe that, in the late revision, the judgment by default is not enumerated among those affected by the operation of the act, as it was in the revised code of 1835; and the question, therefore, is not likely to be of any practical importance hereafter.

The remaining reason for arresting the judgment, at the motion of Wash, and the one which probably influenced the action of the court of common pleas, was the finding of the jury on the pleas of adultery and abandonment, from which it appeared by the record that the demandant was not entitled to any dower according to the construction which was given to that finding, and which will be considered hereafter. In Coke Litt. 125 b, the law is thus stated: "In a plea personal, if one plead a plea which excuseth himself only, and the other plead another plea which goeth to the whole, the plea which goeth to the whole shall be first tried; for if that be found, it maketh an end of all, and the other defendant shall take advantage hereof, because the discharge of one is the discharge of both. But in a plea real it is otherwise; for every tenant may lose his part of the lands. As if a *precipe* be brought, as heir

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to his father against two, and one plead a plea which extendeth but to himself, and the other pleads a plea which extendeth to both, as bastardy in the demandant, and it is found for him, yet the other issue shall be tried; for he shall not take advantage of the plea of the other; because one joint tenant may lose his part by his misplea."

In an action on contract against two or more, if one defendant is defaulted, and the others, under the general issue, set up and maintain a defence which clearly negatives the plaintiff's right to recover against either of the defendants, and shows that he has no cause of action, the plaintiff is entitled to judgment against the defendant who is defaulted. *Bowman vs. Noyes*, 12 N. H. R. 311. But this is not the case, it seems in real actions: for it is laid down that if, in dower, one pleads a bar which goes to the whole, and the other says he is, and always has been ready to render dower, the demandant may recover immediately against the latter, and shall not be compelled to await the trial of the first issue. So in *formedon* against two, if one pleads bastardy, and the other confesses the action, the demandant may have judgment for a moiety. *Roscoe on Real Prop.* 233.

Upon these principles, then, the court could not give Wash the benefit of the pleas set up by his co-defendants, Ames and Cozzens, supposing the verdict upon those pleas to have entitled them to a judgment. And this brings us to the consideration of the motion for a judgment *non obstante*, by the demandant.

The finding of the jury, on the several issues presented to them, established the following facts:

1. That Cecile Lecompte, the demandant, voluntarily left Bisette, her husband, and went away, and lived in adultery with Lecompte.
2. That she did not continue in adultery with said Lecompte until the death of Bisette.
3. That after the 5th February, 1825, she did not voluntarily leave her husband, and go away, and continue in adultery with said Lecompte.
4. That she did not voluntarily leave her husband, and go away, and continue with Lecompte, an adulterer, until the death of her said husband, and until after the 5th Feb., 1825.

The condition of the wife at the death of the husband, when her inchoate title to dower is consummate, must determine her rights; for where the husband *aliens* his land, and then the wife is attainted of felony, she is disabled; but if she be pardoned before the death of her husband, she shall be endowed. *Co. Litt.* 33 a. "Elopement is only a

Stine vs. Austin.

temporary bar, until reconciliation, which being accomplished, the temporary bar ceaseth." Mennile's case, 13th Co. 23.

If the adultery and desertion of the demandant commenced or continued after the 5th Feb., 1825, without reconciliation before the death of the husband, her right to dower was forfeited by the law, as it stood at the time of her husband's death.

In looking at the verdict of the jury, it is obvious that the court of common pleas could not have entered judgment *non obstante*, as the demandant desired. The finding on the second, third and fourth issues did not require an inference that the said Cecile Lecompte did not continue in adultery and abandonment from her husband after the 5th of Feb., 1825, though it is expressly found that she did not continue so with the said Lecompte. But whilst a judgment could not, with any propriety, be entered for the demandant, because of the verdict on the second, third and fourth issues, neither could the court, without overlooking this finding on the last three issues, be authorized to give judgment on the first alone. This finding is ambiguous when taken in connection with the verdict on the other issues; it may or may not have been a bar to the demandant. The fact of reconciliation, or no reconciliation, is nowhere found, and the court, upon the motion in arrest made by the demandant, should have ordered a repleader. It is obvious that the case has not been determined on its merits, and that some degree of negligence or mismanagement is attributable to both sides.

The judgment will therefore be reversed, and the cause remanded for a repleader.

STINE vs. AUSTIN.

When there is a running account of articles furnished by a mechanic, for a building, if the last item be furnished within six months of the commencement of the suit, he is entitled to recover on the whole account.

APPEAL from St. Louis Circuit Court.

NAPTON, J. delivered the opinion of the court.

This was a *scire facias* on a mechanic's lien for lumber furnished in building a house. The lien was filed on the 22d April, 1841; the last

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item of the account filed is the 23d Oct., 1840; and the defendant insisted before the circuit court that the plaintiff was only entitled to recover for so much of the account as had accrued within six months previous to the filing of the lien. The court being of a different opinion, a verdict was had against Stine, and a judgment thereon, to reverse which he has appealed to this court.

The account in this case, was a running account, and constituted but one entire demand, which accrued only when the last item was furnished; the lien having been filed within six months from the time the last item was furnished, was filed in time.

The judgment of the circuit court must be affirmed.

SUTTON vs. CLARK.

The provision of the act to regulate practice at law, which authorizes the court to try issues of fact where neither party requires a jury, applies only to cases in which both parties appear in court.

ERROR to St. Louis Circuit Court.

LANGTON, for Plaintiff in error.

On the part of the plaintiff in error, it is contended that the judgment below should be reversed because the issues which were joined to the country, were tried by the court without the consent of the defendant. This is against the legal and constitutional right of the defendant, and the trial *de facto* having been had, *ex parte*, makes no difference. The record shews that there was a verdict by the court, and judgment upon said verdict.

The replications of the defendant that the husband lived apart from defendant, without denying the coverture, present no such legal points as will, in law, support the judgment rendered in the case.

NAPTON, J. delivered the opinion of the court.

This was a petition to foreclose a mortgage. The defendant pleaded that she did not undertake and promise, as the plaintiff alledged, &c.,

Beckwith, Adm'r, &c. vs. Boyce.

and secondly that she was, and still is the wife of John Sutton. The plaintiff replied to the second plea of coverture, four replications, not material to be noticed here. At the July term, 1845, the plaintiff appeared by attorney, and not requiring a jury, the issue of non-assumpsit was found by the court, and a judgment of *nil dicit* being given on the replications, the court assessed damages, &c. This case is precisely within the principle of *Pratte and Cabanne vs. Corl*, 9 M. R. p. 164, in which it was held that the provision of the practice act, which authorizes the courts to try issues of fact where neither party requires a jury, is only applicable where both parties are present, and in a situation to make an election.

The judgment must be reversed, and the cause remanded.

BECKWITH, ADM'R. &c. vs. BOYCE.

Sheds erected upon posts set in the ground by a tenant, for the purpose of making brick, are fixtures: and although they may be liable to be removed by the tenant during the lease, upon the termination of the lease vest in the landlord.

ERROR to St. Louis Circuit Court.

Bogy, for Plaintiff in error.

POINTS.

1. During the term, the lessee may remove fixtures set up for trade, but after the term they become a gift in law to him in reversion, and are not removeable. *Poole's case*, 1 Salkeld 368; *Holmes vs. Tremper*, 20 John. Rep. 29; 2 Kent's Com. 544 and 345; *Lyde vs. Russell*, 1 B & A, 394; 20 vol. Com. Law Rep. 407.

2. Unless the lessee uses his privilege during the term to sever them, he cannot afterwards do it. *Lee vs. Risdon*, 7 Taunt. 188; *Colgroves vs. Dios Santos*, 2 B. and Cress. 86; *Gibbons on the law of Fixtures*, 13 Law Library 22.

3. The tenant's right is considered as a privilege which must be exerted before the expiration of his interests in the land, and if not exerted then it cannot be afterwards. *Gibbons on the Law of Fixtures*, (13 Law Library) 38, 39, 40, 41, 42.

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4. The first instruction given by the court is not correct, because it is ambiguous, and contains two propositions, viz: The giving up of the premises by the lessee, and the actual possession taken by the lessor.

5. An actual possession is not necessary to vest in the lessor all his rights, &c., the expiration of the term, and the abandonment of the property by the lessee is sufficient.

6. The second instruction is also wrong; it assumed the fact that the action of trover would lie if the facts were of a certain character. This instruction is calculated to mislead the jury, and is not true in point of law. See the case of Lyde vs. Russell, 1 Barn & Ald. 394, (20 vol. English Com. Law Rep. 107.)

7. The premises had been abandoned by the lessees for several months before the judgment was recovered against them by Boyce. Could Boyce or the lessors go on the premises a long time after the possession of it had thus been given up, to take the fixtures?

8. From the memorandum at the foot of the lease, it appeared to have been the intention or contract of the parties, that all the erections on the property leased should not be removed until the rent was paid. In this case it appears that the rent was not paid.

9. The landlord is entitled to a lien on all the improvements on the premises, as a security for the rent.

POLK, for Defendant in error.

POINTS AND AUTHORITIES.

1. The property for which this action was brought, was not what can properly be called fixtures, but strictly *personal chattels*; Gibbon's Law of Fixtures, 15; 19 Law Library; 17 John. R. 116; 7 Cow. 319; 1 Metcalf 27.

2. The instructions given by the court below, are not erroneous in point of law, as applicable to the facts of this case. 20 John. R. 29; 5 Pick. R. 487; 2 East. 88 a.

3. The judgment of the court below ought not to be reversed, for the refusal of that court to give the instructions prayed by defendant's counsel. 20 John. R. 29; 3 East. 38; 2 do. 88 a.

4. The counsel for the defendant in error, also maintains that the court below was right in overruling defendant's motion for a new trial.

NAPTON, J., delivered the opinion of the court.

This was an action of trover brought by Boyce, to recover damages

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for the alledged conversion of a quantity of lumber by Smith, the intestate of Beckwith. The plaintiff had a verdict and judgment in the circuit court.

The plaintiff claimed the lumber under a bill of sale from the sheriff of St. Louis county, who had levied on it, and sold it under two executions issued against Dickinson & Holmes. The lumber, at the time of the levy and sale, consisted of two sheds, erected on a lot belonging to Smith, the largest of which was for the purpose of making brick,—the other for drying them. They were standing at the time of the sale, the posts which supported them being stuck in the ground. Smith, the intestate, had leased this lot to Dickinson & Holmes, for one year from 1st March, 1840, who occupied the same for some time, making brick thereon with a new patent brick-making machine, but abandoned the premises sometime in the fall or winter of 1840. The sale of the sheriff was in July, 1841; at the time of the sale, Smith was present on the lot, and notified all present not to buy, as he would not let a single foot of it be taken away. The rent of the lot, it appeared, was due to said Smith; and the lease from Smith to Dickinson was given in evidence, in which, after the signature of Dickinson, were the words, "If the above contract is not fulfilled, the fixtures are not to be removed."

The court gave the jury two instructions:

1. If the jury believe from the evidence, that any part of the property, for the conversion of which this action is brought, was erected on the land of the defendant's intestate, as a fixture or fixtures, for the purposes of trade by Dickinson and Holmes, such fixtures could not be removed from the freehold of the defendant's intestate, after the expiration of the term under which Dickinson and Holmes held, unless such fixtures were removed before D. & H. had left possession of the said freehold, or before the defendant's intestate had actually re-entered upon the same.

2. If the jury believe, from the evidence, that the property for which this suit was brought, constituted erections, and apparatus set up by Horace B. Dickinson, for the purpose of carrying on the trade of manufacturing brick, and that said Dickinson was the lessee of defendant, Smith, of the premises upon which the same was set up for the purpose of manufacturing brick, then the action of trover will lie for said property.

The first question, and indeed the principal one presented by this record is, whether the sheds erected by Dickinson and Holmes, for the purpose of carrying on the manufacture of brick, were *fixtures*. Fixtures are defined to be "chattels or articles of a personal nature which

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have been affixed to the land." Toml. Law Dict. Tit. Fixtures. The definition given by Bacon is, that it is "a thing personal in its nature, but appended to the inheritance, or affixed thereto, so that its separation therefrom would injure or prejudice the inheritance." 3 Bacon 63, Philipson vs. Mullanpny, 1 M. R. 623. It would be both tedious and unprofitable to review the cases, whether English or American, which have attempted to establish what is a fixture and what is not. Judge Cowen, in a learned opinion, delivered in the case of Walker vs. Sherman, has collated them, and the only inference which can be drawn from them is, that each case turned upon its peculiar circumstances, and no general rule was, or could be extracted from them. It is observable, however, that these cases have usually arisen, and all the difficulties have been started, where manufacturing machinery of some sort has been connected with a building. I have seen no case in which the *building* itself, whether temporary or permanent, whether of wood or brick, whether set up on blocks, or supported by posts let into the ground, has not been regarded at least as a fixture. Whether it was a fixture which could be removed by the tenant, whether it would go to the heir or executor; and whether it would pass to the vendee of the land, are questions which have been discussed in a variety of cases, without settling any very satisfactory rule for their solution. But the sheds spoken of by the witnesses in the present case, were not a portion of a manufacturing machine; they were merely constructed for the protection of manufacturing implements from the weather, and were no more a part of the machinery itself, than if they had been permanent and well constructed houses. If the sheds were for the purposes of sheltering this manufacturing machinery, and rested upon posts placed in the ground, were they not fixtures erected for manufacturing purposes?

In Horn vs. Baker, (9 East. 215) it was not doubted but that distiller's vats, supported upon brick work and timber, but not let into the ground, and vats standing on horses or frames of wood, were goods and chattels; but it was held that stills set in brick work and let into the ground were fixtures.

The first instruction given by the circuit court, leaves to the jury the determination of this embarrassing question, and the jury are told that if, in their opinion, the property sued for was a *fixture*, then it could not be removed after the termination of the lease, or at least, after the lessor had resumed possession. Admittitting that the jury were competent to decide whether the property sued for was a fixture or not, without any information from the court as to what made personal pro-

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perty fixtures, the jury might still have been somewhat embarrassed to determine in what way that finding would affect the merits of the case. Notwithstanding they believed the property to be fixtures, and notwithstanding they believed these fixtures had not been removed during the tenancy, they may have felt themselves at liberty to infer, as Judge Spencer declared the law to be in *Holmes vs. Tremper* (20 J. R. 28,) that though the tenant would commit a trespass in removing the property after his term had expired, yet the property remained unchanged, and trover would still lie. This may have been the opinion of the circuit court, and the second instruction seems to countenance this idea. But we have rather conjectured that it was the intention of the first instruction to convey to the jury the idea that if the property was a fixture, the action could not be sustained, provided the jury should find that it had not been removed previous to the re-entry of the lessor. The instruction, if so understood, so far as it goes, is unquestionably the law, but it leaves the jury without any guide to assist them in determining whether the property was a fixture or not. In this point of view it is objectionable.

The second instruction seems to intimate the law to be, that if the property sued for consisted of erections for manufacturing purposes, the plaintiff was entitled to recover. This must have been upon the assumption, that if the property was placed there for manufacturing purposes solely, it was no fixture, and therefore liable to be levied on as the personal chattels of *Dickinson & Holmes*. It is true that fixtures erected for manufacturing purposes have been regarded somewhat differently from those erected for agricultural purposes. In *Elwes vs. Man*, (3 East. 38) Lord Ellenborough considered erections for agricultural purposes, such as beast houses, folds, cart houses, &c., as not removable by the tenant even during the term. When the building is erected as a mere accessory to a personal chattel, it may be removed; but when it is accessory to the realty, it cannot. The latter are not regarded as fixtures at all. The English and American cases are uniformly hostile to the idea of mere loose moveable machinery, even where it is the main agent in prosecuting the business to which a freehold property is adapted, being considered as a part of that freehold for any purpose. "To make it a fixture," says Judge Cowen, in *Walker vs. Therman*, "it must not only be essential to the business of its erection, but it must be attached to it in some way; at least, it must be mechanically fitted, so as in ordinary understanding, to make a part of the building itself."

The law applicable to the case now under consideration was correct-

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ly stated in the first instruction given by the circuit court. That instruction, if understood as we have heretofore supposed it should be, is supported by the authorities. Poole's case, 1 Salk. 368; Lyde vs. Russell, 1 B. & A. 394. The property or fixtures which would be in the tenant during the term, vests in the landlord on the determination of the term, upon the legal presumption that they are voluntarily relinquished in favor of the landlord. Was not the presumption in the present case, greatly strengthened by a lapse of four months after the expiration of the term, and more than that since the lessees had abandoned the possession, especially when it appeared that rent was due, and there was proof of an agreement that the fixtures should be left for that purpose? It may be said that the evidence showing these facts was not legal. How that may be does not appear; but the record shows that such evidence was before the jury who tried the case, without objections, and whether properly before them or not, was not the mere fact of leaving the property on the premises, after the termination of the lease, evidence of a design to abandon it to the landlord in payment of the rent?

Judgment reversed and cause remanded.

WELLES, USE OF, &c. VS. GATY, McCUNE & GLASBY.

Where A and B jointly contract with C, and in compliance with the contract, advance money to C; in an action of assumpsit brought on the recission of the contract, against C for the money received by him, both A and B must join, although, the money may have been advanced by A alone. A & B are to be considered as partners, and the implied promise to pay is raised in behalf of them jointly.

ERROR to St. Louis Court of Common Pleas.

PRIMM & TAYLOR, for Plaintiff in error.

It is contended for the plaintiff that the contract having been rescinded, there was, at the time of bringing suit, no valid contract existing, affecting the right of the plaintiff to recover *alone*, and in his own name, for he alone had paid the money for which he had received no consideration.

There was no obligation on the plaintiff, after the recission of the contract, to bring his special action on the contract. 2 Carr and Payne,

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286; 4 Bing. 5; 12 J. R. 363, 274; 5 J. R. 85; 5 Mass. R. 199; 13 Mass. R. 139.

The nature of the action, and the legal condition of the parties are changed after the rescission of the contract from what they were when the contract was in force; and the law and the reason of the law say with clearness and simplicity to the defendants, you now hold the money independent of, and contrary to the contract and to the plaintiff's use, and he has his plain action to recover it.

If Wetmore had actually paid a moiety of the money, he could by separate action recover it back. 6 Wend. 263.

If the above views be correct, then there was error in the refusal of the court to set aside the non-suit.

SPALDING & TIFFANY, for Defendants in error.

POINTS AND AUTHORITIES.

I. On the case as made it was right to instruct the jury that the suit should have been brought in the name of both Wetmore & Welles.

1. If there are *too many*, or *too few* plaintiffs, it is a ground of non-suit, on the general issue. 1 Chitty's Plead. 5, 6, 7, 8 & 9; 1 Bos. & Pul. 73, in notes; 2 John. cases, 382; 6 Mass. Rep. 460. "The want of proper parties in actions on contract, is an exception to the merits to be taken advantage of on demurrer, in bar, and on the general issue, but not by plea in abatement."

2. The written contract was with *Welles* and *Wetmore* as *party of the second part*, and the agreement to pay was by *them* as *one party*, and the promise to build the boat was *to them* jointly as *one party*; any suit, therefore, for the violation of that contract, must have been brought by both jointly.

3. The payments made, to wit, the cash payment of \$1000, made to the parties of the first and second part, and the second payment afterwards made, was in law a payment by the party of the *third part*, that is by Welles at Wetmore, although, as between them Welles may have raised the whole of the money out of his private resources. Suppose each had contributed a portion of that and the *subsequent payment*, would it have been the individual payment of each for his portion? It matters not how the receipt is written, whether in the name of one or both.

4. In bringing the suit now to recover back the money paid, it is on the ground that the contract is rescinded, for if the contract were considered in force, the suit would have been upon it, and in suing on this

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contract, the action must have been in the names of Welles and Wetmore, joint covenantees.

5. If the contract be rescinded, an implied assumpsit is held by plaintiff to arise to refund the money. But in whose favor does it arise? Does it arise in favor of the *party of the third part*, Welles and Wetmore, or does it arise in favor of Welles individually for what he may have paid, and in favor of Wetmore for what he may have paid? And will the court enter into the state of accounts between Welles and Wetmore in this manner?

6. The money when recovered may not belong entirely to Welles. The proof is that he was to advance money, and Wetmore contribute services. Suppose the contract rescinded by the fault of the defendants, is Welles to have back all the money advanced by him, and yet Wetmore to lose his services? And can Wetmore bring a suit individually to recover for his services lost by rescinding the contract? On the contrary, are they not one party, (according as designated in the contract) and bound to sue and recover in their joint names, adjusting the amount of the recovery between themselves? They are *quasi* partners in this matter.

7. But the contract was not rescinded, and therefore Welles could not sue in this form of action; for even admitting facts to have existed to authorize the contract to be rescinded, yet it has not *in fact been rescinded*. The defendants have not claimed to have it rescinded. Wetmore has not assented to its being rescinded: and it is not in the power of Welles alone to rescind it. For admitting (what is the law) that in certain cases *one party* can rescind a contract for the misconduct of the other, yet a portion of one party cannot rescind it. If the party of the third part might have rescinded it in the present case, yet that party has not acted. Chitty on Contracts, 275-6-7.

8. The party of the third part (Welles & Wetmore,) were guilty of the first default in failing to pay the instalment at the time, and this caused the delay in the work. It was not in their power to rescind the contract even if they attempted to do so. Chitty on Contracts, 275. "The right to rescind a contract rests only in the party who has been guilty of no default." Ibid. 275. The right to rescind must be exercised in a reasonable time; and it can be exercised only where the parties can be put in *statu quo*. Long on Sales, 238-9-40-1-2, &c. Here Welles and Wetmore never rescinded the contract, never gave any notice that they intended to do so, but lay by and permitted the defendants to complete the work, and were themselves *the first to break the contract*. 3 Stark. on Ev. 1770. That if a party does not rescind a con-

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tract as soon as he is made acquainted with the reason, and his right to do so, he is deprived of the privilege. In the case of defect in goods sold, he must do it after sufficient time allowed for examination and trial. Long on sales, 240.

9. 7 Greenleaf, 70, Brinley vs. Tibbetts. If party, having right to rescind contract because not performed in time, does any act amounting to an admission of its existence, he cannot afterwards elect to treat it as void. In the present case the boat was to be furnished by the 1st June, and it was *after* that day when Welles paid the second instalment on the contract to the Dry Dock Company, which had been due ever since 1st March; thus acting on the contract after he knew the time was out for its fulfilment, and that the delay had been occasioned by his breach of it.

10. To permit one of the two, (either Welles or Wetmore) to sue alone, is subjecting persons in the situation of the defendants, to be harrassed by a multiplicity of suits. Suppose the company that engaged the building of the boat had consisted of ten, instead of two persons; each, on rescinding the contract, would have a right to bring a suit in his own name for any amount he might have advanced for the common object.

11. To permit such suits must lead to investigations not proper or competent for a court of law. How, in such a case, can a court of law ascertain how much each ought to recover? An account must be taken, and it must be ascertained how much each is entitled as between himself and his co-contractors to receive; and in ascertaining this, an investigation must be had as to what each has contributed in money or services, &c.; and, in fact, all must be done that is necessary in closing up a co-partnership.

II. Whether the instruction given was right or not, can make no difference, as the plaintiff below was not injured thereby; inasmuch as the covenants in the instrument between the parties were dependant covenants, and the plaintiff, on his own showing made out no case, and was not entitled to recover. 8 Mo. Rep. 487, Freeland vs. Administrator of Thomas.

The covenants being dependant, and the plaintiff having proved that he failed to keep *his*, it follows, of course, that he had no cause of action on account of the failure of the defendants to keep *theirs*, which failure was caused by the plaintiff's own previous failure to perform a pre-requisite.

III. The instruction asked on behalf of the plaintiff was properly refused, inasmuch as it cuts off from the jury certain matters of fact

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and requires them to assume such matters of fact to be true; as, for instance, the making of the contract: it is also wrong in making the recovery depend on the fact of payment by Welles alone, whereas it should have been payment by him of his own money, &c.

NAPTON, J., delivered the opinion of the court.

Welles and Wetmore contracted with the Dry Dock Company of St. Louis, and Gaty, McCune and Glasby, for the building of a steam ferry boat. The contract was a written one, and purported to be between Gaty, McCune & Glasby, of the first part, the Dry Dock Company of the second part, and Welles and Wetmore of the third part. The boat was to be built in specified manner, and delivered in a specified time. From some cause, not material to be enquired into, the boat was not ready in time, and Welles and Wetmore refused to receive it when it was finished, and treating the contract as rescinded, Welles brought this action of assumpsit to recover back the money which had been advanced by Welles and Wetmore under the contract. It appeared in proof that all the money advanced was in fact Welles' money, and that Wetmore merely contributed his services. Upon the trial the defendants insisted that upon the facts as heretofore stated, the suit should have been in the joint name of Welles and Wetmore, and the court of common pleas so ruled. Thereupon the plaintiff took a non-suit, and afterwards moved to have it set aside. This motion being overruled, he brings the question before this court by writ of error.

We think the court of common pleas decided correctly. Had the suit been brought on the contract, there could have been no question but that Wetmore and Welles, constituting, as they did, but one party to that contract, must have sued jointly. The contract being rescinded, the question is, to whom does the implied promise to refund arise, to Welles alone whose money was advanced, or to Welles and Wetmore jointly, on whose joint account it was advanced? Was not the payment, in point of law, the payment of Welles and Wetmore, on a contract in which said Welles and Wetmore constituted but one party? The implied promise must correspond with the actual payment of the money, and the court cannot undertake in an action of assumpsit, to settle the accounts between Wetmore and Welles. Where the promise is made jointly to two, they must both join, if living, in the action, or they will be non-suited. *Wright and others v. Post*, 3 Conn. R. 142. So if a party covenant with A & B to pay an annuity to A, this vests a joint legal interest in A & B. although the former is to derive the sole

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benefit; for only one duty was to be performed, and there could not be a separate legal interest therein. 1 Chitt. Pl. 11.

It may be said that this was a partnership limited to a particular undertaking, which failing, the partnership ceased. This may be true, but the right of action upon an assumpsit originating during the partnership, must still vest in the partners, notwithstanding the dissolution. The case of *Shearman vs. Adkins*, (4 Pick. R. 290,) determines this. In that case two persons had been appointed guardians of a spendthrift, and sold his real estate by virtue of a license granted by the court of common pleas, and applied the proceeds to the payment of his debts, some of the debts being paid by one guardian, and some by another. The letters were afterwards revoked; the sales avoided, the license having been granted contrary to law, and the guardians were compelled to refund the money. It was held that the guardians had a right of action against the spendthrift's administratrix for the amount refunded, as so much money paid by them upon a consideration which had failed, and that they had properly joined in the suit. They were considered as constituting but one party, when the payments were made, which was the foundation of the action. This established such an union of interest as authorized them to join in any suit for indemnity in consequence of a loss happening during their joint administration of the affairs of their ward. "It is true," observed Parker, Judge, in delivering the opinion of the court, "that their connexion is dissolved, but their interest remains joint as to any remedies they may be entitled to, on account of any joint transaction founded upon their relation to their ward."

So in the present case, the true question must be, was there a union of interest between Welles and Wetmore, when the payment was made, to recover which back this suit is brought? If such were the case, though the joint interest has ceased, the action to recover an amount accruing during its existence, and growing out of the contract which created the partnership, must be brought in the names of Wetmore and Welles. *Gould v. Gould*, 6 Wend. 263.

Judgment affirmed.

CHAMBERS ET. AL. VS. LECOMPTE.

1. Where a bill seeks a specific performance of a contract, which appears from the bill itself to be within the statute of frauds, it is ground of demurrer.

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2. A verbal agreement that A will convey a tract of land and pay a sum of money to B, in consideration that B shall make a deed confirming the sale of another tract of land to C, although executed by B, is within the statute of frauds, and a court of equity will not compel A to perform the contract. The execution of the deed of confirmation by B is not a part performance which takes the case out of the statute.

APPEAL from St. Louis Circuit Court.

GOODE & CORNICK, for Plaintiffs in error.

1. The case described in the bill comes within one of the classes of cases in which chancery will decree a specific performance, notwithstanding the statutes. See Fonblanque's Equity, p. 150—top page; Sugden on Vendors, bottom page, 114 & 115; 2 Story's Equity Commentaries, page 66.

2. Even if the contract described in the bill had not been specific in its terms, it could not be dismissed. See 2d Story's Equity Commentaries, p. 70, note 3, and the authorities there cited; Parkhurst vs. Van Cortland, 1 John. Ch. R. 283.

3. If M. P. Leduc had been living when the bill was filed, there was no necessity for making him a party, as under the statute he had no interest. See Digest of 1835, page 119, sec. 1.

NAPTON, J., delivered the opinion of the court.

This was a bill in chancery to compel the specific performance of a verbal contract.

The bill charges that in the year 1823, Hyacinth Lecompte conveyed a lot in St. Louis, on First street, formerly owned by one Periconneau, to Cecile Compare for life, with cross remainders over to her two daughters Catharine and Louise, and her son Hyacinth. This last person died in 1835, a minor, and without leaving issue.

On the 17th February, 1841, Catharine and Louise Compare conveyed to M. P. Leduc, for the use of their mother, Cecile Lecompte, (who had previously to this time married said Hyacinth Lecompte) all their reversionary interest in said lot of ground on First street. Both Catharine and Louise were at this time minors. Louise afterwards married George W. Wilson, and became of age on the 1st of February, 1842.

On the 3d of June, 1841, said M. P. Leduc, Hyacinth Lecompte and Cecile, his wife, conveyed the lot on First street to T. J. White, in

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consideration of one thousand dollars paid in cash, and a lot on Mound street, previously conveyed by T. J. White and wife to Leduc as trustee of said Cecile Lecompte. The bill alleges that the bargain was a bad one on the part of Lecompte and wife, the difference in value between the two lots being really four thousand instead of one thousand dollars. It is not stated in the bill what interest is given by the deed from White to Leduc, for the use of Cecile Lecompte, to the children of said Cecile Lecompte. Shortly after this conveyance from Hyacinth Lecompte and wife, and Leduc to White, the latter conveyed to E. Tanner, and on the 9th June, 1841, Leduc, Hyacinth and Cécile Lecompte, conveyed to R. C. Gist, as trustee for Edward Tanner, the Mound street lot, which had been conveyed to them by White, as a security for a release from Catharine Compare and Louise Wilson, formerly Compare.

The bill then proceeds to represent that considerable efforts, and some very unfair ones were used by the mother, Cecile Lecompte, to procure the release or ratification of a former conveyance from her daughter, Mrs. Wilson; and that finally the said Cecile (the mother) told said George W. and his wife, Louise, that if they would confirm said deed, which was executed as heretofore stated by Catharine and Louise Compare, she, said Cecile, would, by deed, grant to said George W. and his wife the same interest in said lot on Mound street, to be enjoyed at once, which they would be entitled to at the death of said Cecile, and that she would give immediate possession, and that she would pay to said George W. and wife that portion of said sum of one thousand dollars, paid as aforesaid by T. J. White, as the difference in value between the lots exchanged, to which they would be entitled at her death; and that if unable to pay the five hundred dollars in hand she would secure its payment.

The said George W. and wife thereupon executed their deed of ratification on the 21st February, 1842, but the said Cecile Lecompte refused to perform her part of said agreement. This bill is brought by George W. and his wife, and one Chambers, to whom the said George W. and wife had made a conveyance as trustee for the benefit of themselves jointly, and their survivor and their heirs, &c. Hyacinth Lecompte had died before the filing of the bill.

At the April term, 1845, the defendant filed her demurrer to the bill, and on the 31st May the following special causes of demurrer were assigned: 1st. That the real estate, mentioned in the said bill, on Mound street, was and is held by the defendant for her life, and the remainder in said real estate goes to the said wife of Wilson, and the said Catharine Compare, or the survivor of them, and the said defendant has no

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power to convey said property, or any part thereof, prior to the death to either of the persons entitled in remainder. 2nd. Because the bill does not show that the person entitled to the remainder consented to the agreement set up in the bill. 3rd. Because the complainants have a remedy at law. 4th. Because the said agreement in relation to said real estate is void by the statute of frauds. 5th. Because the said H. W. Chambers ought not to be a party to said bill.

The demurrer was sustained and the bill dismissed, and from this decree the complainants have appealed.

The first question which arises in this case, is whether the defendant can by demurrer avail herself of the benefit of the statute of frauds. Where the bill sets out the contract in general terms, the presumption of law is that it is a legal and valid contract, and therefore, if a contract in relation to land, that it is in writing and signed by the party to be charged therewith; consequently, if the defendant in such case desires to set up the statute as a defence, it must be done by a plea in bar, or insisted on in the answer. But where the complainant in the bill shows a contract not in writing, and so expressly describes it, the defendant may demur; and unless the facts set forth in the bill are sufficient to withdraw the contract from the operation of the statute, the demurrer must prevail; *Corine vs. Graham & Bleeker*, 2, page 177.

In this case the bill in terms sets up a *verbal* contract, and is therefore a fit subject for demurrer. The only question is, whether the facts and circumstances mentioned in the bill are sufficient to take the case out of the statute.

The usual ground upon which courts of equity have withdrawn contracts from the operation of the statute of frauds is part performance; but in what this part performance consists, has been a question upon which a great variety of opinions has prevailed. In former times, and especially during Lord Hardwick's administration of this branch of law in England, it was supposed to be well settled, that the payment of a considerable portion of the purchase money was such a partial performance of the contract as exempted it from the operation of the statute; but this opinion soon encountered opposition, and appears to have been finally entirely overthrown by Lord Redesdale, in the case of *Clinan vs. Cooke*, 1 Sch. and Lef. 40. It is now settled that payment of money is not part performance, because it may be repaid, and then the parties will be just as they were before, especially if repaid with interest. The principle upon which part performance takes a case out of the statute, is that it would otherwise make the statute a means of practicing a fraud; and therefore nothing is now considered as a part performance.

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which does not put the party into a situation which is a fraud upon him, unless the agreement is performed; 1 Ves. 221; 2 Story's Eq. sec. 761. The ordinary illustration of the principle is the case of a vendee by a parol agreement put in possession. If the agreement be not valid in law or equity, he is a trespasser and liable to an action. As a matter of defence, it is held, that he can, under these circumstances, show the parol agreement by which he acquired possession, and the unwritten agreement being admissible for this purpose is admissible throughout. The case is still stronger where the vendee has not only taken possession, but expended money in valuable or permanent improvements; *Clinan vs. Cooke*, 1 Sch. and Lef. 40. This is the part performance which is in modern times allowed to prevail over the statute of frauds. It requires no further examination into the cases, illustrative of its practical application, to conclude that the one now before the court contains no semblance of a part performance. There was no attempt made to set about the performance of this contract on the part of Cecile Lecompte. So soon as the complainants had executed their deed of release or confirmation, or in other words, had done what was equivalent to a payment of the purchase money in cases where the consideration was a monied one, the defendant refused to comply with her promise. Here was no delivery of possession, no directions even for a conveyance. On the contrary there was, it seems, an absolute and unconditional refusal by the defendant to convey the premises which she had agreed to convey, and to pay the money agreed to be paid, so soon as the deed from Wilson and wife was executed.

There is another class of cases which has been exempted from the operation of the statute, upon nearly the same principles which influenced the court to consider part performances as producing such exemption. It is where the agreement is intended by the parties to be reduced to writing, according to the statute, but it is prevented by the fraud of one of the parties. In such cases courts of equity have decreed a specific execution of the agreement, upon the ground that to leave it unexecuted would be a fraud upon the party for whose benefit it was intended, and the statute which was made to prevent frauds should not be used to promote them. Most of the cases occurring under this head are cases where there was a design of reducing the contract to writing, but such design has been prevented by the fraud of the party who was to have been charged by the agreement. As where instructions were given by an intended husband to prepare a marriage settlement, and he promises to have the settlement reduced to writing, and fraudulently and secretly prevents its being done, and the marriage takes place in consequence

of false and fraudulent assurances, a specific performance was decreed. But if there had been no fraud, and no agreement to reduce the settlement to writing, but the other party had placed reliance solely on the honor or promise of the husband, no relief would have been granted; for in such cases the party chooses to rely upon the parol agreement, and must take the consequences; 2 Story's Eq. 78. In this class of cases it is important to distinguish that kind of fraud which every breach of promise or breach of trust implies, from a direct fraud, where trick or contrivance has been used to place the party who has complied with a contract on his part, in a position where he is without written evidence of the contract he desires to enforce against the other. It is this latter kind of fraud only which will authorise the interference of a court of chancery, or form the basis of an action at law. No instance is to be found where the courts have interfered, and decreed a specific performance where the fraud consisted only of a breach of promise. Indeed, if such were the law, the statute of frauds would be a dead letter.

There are some cases, it must be admitted, in which opinions have been expressed which cannot be reconciled with the foregoing doctrine relating to this kind and degree of fraud necessary to take a case out of the statute. In *Walker vs. Walker*, (2 Atk. 99) the defendant was permitted to read parol evidence to rebut an equity set up by the bill. In that case the plaintiff and defendant were brothers; an elder brother told the plaintiff that if he would surrender his copy-hold estate for the benefit of the defendant, he would secure him an annuity for life; the plaintiff agreed to these terms, and promised to surrender his copy-hold: the elder brother thereupon surrendered his copy-hold to the defendant charged with these annuities. The defendant refused to pay them unless the plaintiff would surrender his copy-hold pursuant to his promise. This was a mere matter of defence; but Lord Hardwicke is reported to have said, that if the defendant had brought his cross bill to have this agreement established, he was not sure the court would not have done it, considering it in the light of those cases, where one part of the agreement being performed by one side, it is but common justice if it be carried into execution on the other.

So in *Joynes vs. Statham*, (3 Atk. 388) which was a bill for the specific performance of an agreement for a lease of a house, the defendant was permitted to show, by way of objection to the specific execution of the judgment, that the plaintiff omitted to insert in the agreement what was intended as a part thereof, to wit: that the tenant should pay the rent clear of taxes. Lord Hardwicke said, if the defendant had

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been the complainant, and brought his bill for a specific performance, he did not see but that he might be allowed to declare this parol agreement to the court.

The intention by Lord Hardwicke in these two cases has been noticed by Lord Redesdale in *Clinan vs. Cooke*, and declared to be contrary to all the decided cases. Lord Redesdale takes a distinction between setting up such agreements by way of defence, and asking their specific execution in the character of plaintiffs. The former is admissible, as the statute does not say that a written agreement shall bind, but that an unwritten one shall not.

In the case of *Boyd vs. Stone*, the facts were very similar to the present. The defendant having received a conveyance of land from the plaintiff, made a verbal promise that he would, on a certain day thereafter, make a defeasance thereof, so that the same should operate as a mortgage. This promise was held to be within the statute of frauds.

So in the principal case, it appears that the deed of ratification or confirmation by the complainants was made according to the real intent of the parties at the time. No fraud was used to procure this deed, or at least none is charged; but the complainants executed it with the intent that it should be delivered, as it was, into the hands of the defendant; and they relied upon her verbal promise that she would at some future time make a conveyance of her interest in the Mound street lot, and would pay them five hundred dollars in cash. To refuse to comply with that promise is morally a fraud; but it is not the species of a fraud which takes a case out of the statute.

Judgment affirmed.

ANDERSON, THOMPSON & TAYLOR vs. ANN BIDDLE.

ERROR to St. Louis Circuit Court.

On motion it was held, that a writ of error will not lie to a decree in chancery.

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OTT vs. SOULARD.

1. A claim was presented to the recorder of land titles for confirmation, and it was supposed to conflict with the St. Louis commons. The claimant abandoned so much of his claim as conflicted with the commons, and had a confirmation for 30 arpents, that being considered as the amount of the excess not conflicting with the commons. The act of confirmation stated "that only so much was abandoned as lies west of the line of the commons." Held, that the confirmation was not limited in quantity to 30 arpents, but embraced all the claim not included in the commons; the quantity is mere description, which must yield to other matters of description.
2. If no plat, or a defective plat of the survey of a grant, be filed with the recorder, the plat recorded in the books in the surveyor general's office may be resorted to as evidence.
3. The plat in the surveyor general's office is not better evidence than that filed with the recorder—it is only auxiliary evidence.
4. When a survey is made by the officers of the United States, and there is a contest between the United States and the grantee, the State courts will not interfere. But when the rights of others are involved, those rights will not be permitted to be divested by the United States, or its officers.
5. When the calls of a survey are all ascertained and no resort to external evidence is necessary, it is a question for the court. But when parol evidence has to be resorted to, to identify the calls, the facts must be found by a jury.
6. The petition for a concession, called for "le chemin public," the public road; the certificate of survey accompanying the plat of the land conceded, called for "el real camino," the royal road. There being two roads near each other, and the right of the parties depending upon the determination of the road intended in the grant, it is a question of law and fact: the facts to be found by the jury.
7. The courts of this State are bound to take judicial notice of the Spanish laws in force in this territory.

ERROR to St. Louis Court of Common Pleas.

GEYER, for Plaintiff in error.

The plaintiff in error relies for a reversal of the judgment of the common pleas, on the following grounds:

1. The confirmation by the recorder of land titles, confirmed by the act of April, 1816, vested in James Mackay, a tract of thirty arpents, bounded west by the east line of the St. Louis commons.

2. The survey made by L. M. Eiler, deputy surveyor, approved by the surveyor general, is conclusive between the United States and Mackay, of the boundaries of the tract reported for confirmation by the recorder.

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3. The land east of Eiler's survey, being surveyed and sold under the authority of the United States as public land, prior to the passage of the act of 14th July, 1836, the representatives of Mackay acquired no title by that act.

4. The surveyor general had no lawful authority to annul the survey previously made under the authority of and approved by his predecessor, nor to extend such survey, or make a new one, so as to include lands which had been previously sold under the authority of the United States.

5. If prior to the 4th July, 1836, the lot in question was without the boundaries of the tract confirmed to Mackay by the recorder, and within fractional section 26, T. 45, R. 7 E, as surveyed under the authority of the United States, that the United States, before that day, sold said land to R. Duncan, the plaintiffs could not recover, unless the lot in dispute was within the boundaries of the tract of land granted to Mackay, as designated on the plat and certificate filed by Mackay, with his claim, and the court erred in refusing so to direct the jury.

6. The call in the grant and survey for Mackay, for the king's highway, should be understood to be a road previously established by authority, and if previous to that grant there was such a road laid out, and established between the lands of Soulard and Cerre, then the southern boundary of the grant to Mackay, could not be extended east of that road, the calls governing and controlling course and distance.

7. In determining the boundaries of the grant, and the extent of the confirmation under it, the survey and certificate filed by the claimant is better evidence than the diagram of the same survey, furnished by the surveyor general, as copied from the *Register de Arpentage*.

8. The diagram certified by the surveyor general, as copied from *Register de Arpentage*, ought not to have been received in evidence; it does not appear to have been an official act, is certified by no one nor does it appear when, or how it came to the office of the surveyor general.

9. The figurative plat of Chouteau's mill tract ought not to have been admitted as evidence, because it contains manifest and material alterations, and purports to contain surveys not mentioned in the certificate of the surveyor.

10. The testimony taken by, and the proceedings of the commissioners in relation to the location of Carondelet road, ought to have been admitted in evidence.

11. The sheriff's deed to Soulard is not competent evidence; because the description in the advertisement is insufficient: the levy is upon a

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tract of 282 arpents, except such as had been theretofore sold, without designating the parts excepted: the sale was made in parcels according to a division indicated on a plat furnished by Soulard, the plaintiff.

12. Upon the whole case the merits are with the defendant, now plaintiff in error, and the court of common pleas ought to have sustained the motion for a new trial.

Acts of Congress, 2d March, 1805, public lands vol. 1, ch. 74, p. 122; do 28th Feb., 1806, do. do., ch. 79, p. 132; do. 21st April, 1806, do. do., ch. 84, p. 138; do. 3rd March, 1807, do. do., ch. 92, p. 156; do. 13th June, 1812, do. do., ch. 140, p. 217; do 2d Aug., 1813, do. do., ch. 156, p. 233; do. April, 12th, 1814, do. do., ch. 162, p. 242; do. 29th April, 1816, do. do., ch. 197, p. 280; do. 9th July, 1832, do. do., ch. 439, p. 505; do. 2d March, 1833, do. do., ch. 454, p. 518; do. 4th July, 1836, do. do., ch. 507, p. 557; do. 3rd March, 1819, do. do., ch. 232, p. 312.

SPALDING AND TIFFANY, for Defendant in error.

POINTS AND AUTHORITIES.

I. The sheriff's deed to the plaintiff below was properly admitted in evidence.

1. The sale was not irregular on account of its having been made on the 31st of March, on an execution returnable to 1st Monday of February, 1825. Rev. Code of 1825, pages 280-1, sections 5 and 6. This act makes the execution returnable to third Monday of March, 1825.

2. Nor is the sale void for want of a sufficient advertisement. 2 Cain. 61. Simonds vs. Catlin, at page 66, the court lay down the rule to be, "*that at sheriff's sales no property can pass but what is at the time ascertained and declared.*" 13 John. Rep. 96, Jackson vs. Rosevelt, at page 103, the court say that the least that can be required of the sheriff, is *so to locate the lands as to afford means to the by-standers, and bidders, of informing themselves of the value.* 13 John. Rep. 537, p. 552, the court says "the sheriff cannot sell any land on execution, but such as the creditor can enable him to describe with reasonable certainty." 8 Mo. Rep. 186, Evans vs. Ashley. The court ask why the sheriff, if he had failed to get information as to Price's interest, did not state the circumstances, and make the sale in such a way as that nobody could have been deceived.

All the above cases contemplate a reasonable certainty of description given at the time of sale.

Geyer's Digest, 266, sec. 63, was the only act in force directing as to the sale by sheriff, and as to advertisement.

7 Mo. Rep. 531, Hunt vs. Rector, "a sheriff's deed describing the land sold as three and one half eighths of the Boonville tract, situated in Cooper county, on the south side of the Missouri river, is not void for uncertainty of description."

12 Mass. Rep. 514, at page 521-2, the statute required an advertisement, and the court say, "at the sale it was in the power of the debtor to appear and represent the situation of the estate and title; and that the sheriff was then bound to make known to the public what he knew on the subject." This was on foreclosure of mortgage.

14 Mass. Rep. 404, at page 407, the levy was of one-seventh, (1-7,) when the debtors was of one-eighth, (1-8,) the court say it was good, that if execution be levied on one hundred acres and debtor had only fifty, the levy would be good for the fifty.

II. The confirmation by the recorder of land titles embraced all of the Mackay concession, lying east of the line of the commons. This position is contained in the first instruction given for the plaintiff:

1. This confirmation is evidenced by the entry of the recorder compared with the documents.

2. That entry states that Mackay claims about 30 arpents, and that Leduc, his agent, abandons all but 30 arpents, supposed to be comprehended in the commons.

3. Then follows the act of the recorder, a kind of short hand memorandum, "confirmed 30 arpents; no more abandoned than may fall within the commons, should they be confirmed."

4. The spirit and intentment of this act, was the confirmation of all east of the eastern line of the commons; and it is not confined to the quantity named, of 30 arpents. The application, as well as the recorder's memorandum, shows this.

III. Said confirmation embraced all the land east of the line of the commons, according to the Spanish survey as certified from the "*Registre de arpentage*," or record of surveys transferred by the Spanish government, which survey and plat are to be considered better evidence of the Spanish survey of the Mackay tract, than the copy from the recorder's office.

IV. The survey by De Ward being sanctioned by the department, after there had been conflicting claims, and made carefully for the purpose of correcting errors, by instructions from the surveyor's office, was legally to be regarded by the jury, as the authoritative and correct survey determining the boundaries of the Mackay claim.

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V. The confirmation of the Mackay claim by the act of 4th July, 1836, was a better title than that under the pre-emption of Duncan.

Acts of Congress of 2d March, 1811, Geyer's digest; do. 9th July, 1832, do.; do. 4th July, 1836, do; 2 Howard's Rep. 285, Stoddard, et. al. vs. Chambers, showing that lands, the claims to which had been duly filed with the recorder, were reserved from sale by the act of Congress of 9th July, 1832.

VI. All the instructions of the defendant below, making a road established by authority, a boundary of the Mackay claim, were rightly refused.

1. Because there was no such road there.

2. There was a road actually in use there, and the jury had a right to consider that, as the road referred to in the certificate of survey.

3. The claim, as filed, was according to survey, and had that even crossed the road, the confirmation would have been of the same extent.

VII. The survey of the Chouteau mill tract was rightly admitted in evidence.

SCOTT, J., delivered the opinion of the court.

This was an action of ejectment brought by Soulard against Ott, in the St. Louis circuit court, and thence transferred to the St. Louis court of common pleas, where there was a verdict and judgment for the plaintiff, to reverse which this writ of error is prosecuted.

The facts, as preserved by the bill of exceptions, will be best understood stated in their chronological order, and are as follows:

On the 10th October, 1782, Gabrielle Cerre presented a petition to the lieutenant general, Don Francisco Cruzat, praying a grant of 8 arpents of land, having its principal front on the public road. (*camino publico*,) going from St. Louis to the village of the Prairie Catalan, (*Carondelet*,) and running thence to the river—and on the 12th Oct. 1782, the lieutenant governor grants the land prayed for.

On the 18th November, 1786, Joseph Brazeau petitioned for a grant of ten arpents of land, from north to south, bounded east by the Mississippi, and west by the main road of the little prairie. On the 20th of the same month, the Lieut. Governor grants to the petitioner, 10 arpents from north to south, bounded on one side by the river Mississippi, and on the other by the Main road, that leads to the *Prairie a Catalan*.

On the same 18th November, 1786, Gabriel Cerre applied for an extension of his grant of the 12th October, 1782, by granting six ar-

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pents between his former grant, and that of M. Brazeau, and extending from the royal highway, (*Chemin Royal*) to the Mississippi—and on the 20th of the same month, the Lieut. Governor granted the land solicited.

On the 28th March, 1787, J. M. Papin applied for a grant of 8 arpents of land, bounded west by the main road (*Camino Real*) leading to M. Delor's village, (*Carondelet*,) which was granted on the 30th of the same month.

On the 7th of August 1798, Antoine Soulard petitioned for a grant of a tract of 14 arpents in front, by 15 in depth, opposite to a piece of land asked in augmentation by Don. Gabl. Cerre, and granted to him; the same tract of land to be bounded north by lands adjoining St. Louis, south of Mill creek, south and west by vacant lands of the royal domain, and east by a *public road* eighty feet in width, that leads from St. Louis to the village of Carondelet, and that divides the said land of Gabriel Cerre, from that solicited. On the same day the land was granted, and the petitioner was ordered to survey and make a certificate.

The petition of James Mackay, under whom the plaintiff claims, is dated 9th October, 1799. He applies for a grant of a piece of vacant land to the south of this town, (St. Louis) of about 200 and some arpents superficies, which piece of land is (*shall be*) bounded as follows: To the north of the land of Mr. Auguste Chouteau; on the south by that of Mr. Antoine Soulard; on the east by the public road (*chemin publique*) which leads from Carondelet to this town; and on the west by the domain of his majesty. The grant and order of survey are dated on the same day, and directs the surveyor Don A. Soulard, to put the petitioner in possession of the land he solicited, at the place designated in the memorial; and this being executed, he, the surveyor, shall draw a plat of the survey, delivering the same to the party, with his certificate, in order that it shall serve him to obtain the concession and title in form, &c.

On the 19th November, in the same year, Joseph Brazeau, applied for an extension of his grant westward. The petition states the previous concession in 1786; of 10 arpents comprised between the river and the main road, (*Chemin Royal*,) and prays an augmentation of 12 arpents in front, by such depth as will complete to him 30 arpents, &c. On the same day, the Lieut. Governor granted the land prayed for.

On the 5th of January, 1800, the grants to Gabriel Cerre of the 12th October, 1782, and 20th Nov. 1786, are certified to have been survey-

ed by A. Soulard, as one tract, on the 10th Nov. 1799. The certificate refers to the figurative plat prefixed. On that plat, the western boundary of the tract is represented as N. 28 3-4 E, 142 perches, and the words "*camino del villano Carondelet*," are written along that line, representing the western boundary to be the road.

The survey of the grant to Soulard, of 7th Aug. 1798, represents the survey to have been made 20th January, 1800. The certificate refers to the figurative plat prefixed. That plat represents the letter A. at the north-east corner of the survey, B. at the north-west, C. at the south-west, and D. at the south-east, and a stone at each of said corners. The east line is represented as S. 28 1-4 W. 142 perches; the south line as N. 78 W. 150 perches; the west boundary as N. 28 1-4 E. 142 perches; and the north line as S. 78 E. 150 perches.

On the same plat the line of the commons is represented as running S. 24 W. crossing the north line of said Soulard's survey, forty-three perches from the north-east corner. On the same plat is represented the boundaries of the grants to Cerre; and between the survey for Cerre and that of Soulard, is a space running the whole length of the east front of Soulard's tract, on which space are written the words "*Camino de St. Louis a Carondelet de 80 pds de hanco*," and east of that space, and within the grant to Cerre, lines are drawn irregularly crossing the north line of Cerre's tract and thence to the south-west corner of the same tract; along these lines is written *viejo camino*, or *old road*. The certificate states the n. e. corner of the survey of Soulard's grant, to be 93 perches to north 7 1-2 east of the south tower; the boundaries of the tract are stated to be, north by a piece of vacant land next to Mill creek; south, in part by vacant lands, a cross road, and land of Brazeau; on the east, by the road going from St. Louis to Carondelet.

The certificate of Soulard, given in evidence by the plaintiff, is dated 17th Dec. 1802, states that on the 24th of the same month, he surveyed the land granted to Mackay, as by a figurative plat which precedes the certificate. The land bounded on the north by land of A. Chouteau; south in part by land of A. Soulard, and royal domain; east in part by land of Auguste Chouteau, and in part by the royal highway (*Rt. Camino*) from this town to the village of Carondelet; and west by the royal domain.

In June 1802, partition was made of the estate of the wife of Gl. Cerre, who had then departed this life, and in that partition the land granted to Gl. Cerre, and surveyed for him in January, 1800, was allotted to the wife of Antoine Soulard. Previous to the death of Ma-

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dame Cerre, Gabriel Cerre occupied the land granted to him ; he had enclosed the eastern part, his western fence being paralled to his western boundary, and distant therefrom about 300 feet. At that time the space between his grant, and that of Soulard, was not used as a road, being grown up with trees and undergrowth. The road traveled, led from the bridge to the north-west corner of Cerre's enclosure, (his north fence being on or near his north line,) and from that point southward, there were several roads traveled, between Cerre's west fence and his western boundary, but that most usually traveled was very near the fence, until at or near his south boundary, where it diverged to the west, into the King's highway. After the allotment of Cerre's land to Soulard, in June 1802, Soulard took possession, and immediately extended his fence to, or very near to the western boundary of the grant to Cerre, and the space between the grant to Cerre and that to Soulard, which is admitted to be the space now occupied by Carondelet Avenue, has ever since been used as a part of the road from St. Louis to Carondelet.

The certificate of Soulard given in evidence by the plaintiff, bears date 17th Dec. 1802, and states that on the 24th of the same month, he surveyed the land granted to James Mackay, as represented by a figurative plat prefixed. The boundaries are stated to be: on the north, by land of A. Chouteau; south, in part by land of A. Soulard, and in part by public land; east, in part by land of A. Chouteau, and in part by the royal highway (*Rl. Camino*,) from this town to Carondelet ; and west, by public land. The plat prefixed, gives the courses and distances of all the lines except one, that is the north-east. The south boundary is n. 78 e. 365 poles. On the plat and eastward of the survey, there is a road traced from the point of intersection of the n. e. and s. e. boundaries, in a southerly direction, passing some distance east of the eastern termination of the south boundary. Near the eastern end of the southern boundary, as represented on the plat, is written "Don Anto. Soulard." This plat and certificate were certified by the recorder of land titles, as part of the records in his office.

A plat certified by the surveyer general, though objected to, was given in evidence. It is a diagram without signature or date ; but is certified by Silas Reed, surveyor, &c. that the plat, and the notes thereto are correctly copied from page 55 of the *Registre d' Arpentage, St. Louis*, A, in this office. At the top, above the diagram some distance, are the words "Don Santiago Mackay, No. 94 ;" and beneath the words—"Nota—Situe au S. de la petite Rivere du Moulin qui est aupres de cette ville. Les banes indique sur le plan, tous les arbres

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sont plaques—Arpentee le 24, 8 bre 1802, en vertu du decret de M. Le Lr. Govr. Don Charle Dehault Delassus, en date de 9, 8 bre, 1799—Certificate d' Arpentage expedie du 17, X bre, 1802."

The diagram differs from the plat as certified by Soulard, and given in evidence by the plaintiff, in that, it represents the Mill creek as touching the extreme east corner; and along the north-east line are written the letters and figures "S 29 E, 5 a 6 p." and from a point in the south line, there is drawn a line southward, and between that and the eastern terminus of the south line, the distance is represented to be 16 a 9 prs.

In 1806, Soulard claiming under Cerre, by the grants of 1782 and 1676, and in his own right, under the grant in 1798, and James Mackay under the grant to him of 9th October, 1799, presented their respective claims before the board of commissioners, filing their grants and surveys as required by law. The claim of Soulard under Cerre, was confirmed by the board 30th Aug. 1806. On the claim of Soulard in his own right, that of Mackay, and many others calling for the Carondelet road, the board proceeded to take testimony on the spot for the purpose of determining the locality of said road. The testimony taken, and the proceedings of the commissioners thereon, were objected to, and excluded from the jury.

It appears by the record of the board of commissioners, given in evidence by the plaintiff, that on 22d July, 1806, Mackay's claim was examined by the board, and thereupon, Auguste Choteau testified, that the land was surveyed in 1804 or 1805, and he never heard of a concession before the survey. The board decided the concession to be antedated. On the 31st July, 1807, the consideration of the claim was resumed, but not finally decided on until the 4th of Nov. 1800, when it was rejected.

No proceeding of the board on Soulard's claim is in evidence, until Dec. 16, 1813, when it appears he claimed 56 arps. 9 perches, under the concession of 9th Aug. 1798, for 304 arps. 48 perches; the difference between the claim and concession abandoned, as lying within the claim of the people for commons. James Mackay swears to the concession.

And on the 28th December, 1813, Mackay's claim of 30 arpents of land, under his concession of 9th Oct. 1799, and survey in 1802, came up for consideration, when he abandons all but 30 arpents; the part abandoned supposed to be within the commons. And *Antoine Soulard* testifies that the tract was granted by Delassus, on the recommendation of Trudeau, who had promised the same: it was surveyed under the

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Spanish government, and has ever since been considered as property of claimant. Corn was raised on the premises for claimant during 3 or 4 of the last years. No more abandoned than shall fall within the commons, should they be confirmed.

The report of the recorder of land titles, confirmed by the act of 1816, referring to the claim, concession, and survey recorded in the books of his office, states the quantity claimed by James Mackay to be "30 arpents, surplus abandoned by claimant as falling within the commons of St. Louis;" and under the head opinion of the recorder, is this entry: "Confirmed 30 arps. O. S. Bp, 433, O. Ms. pa. 417, N. Ms. 117. No more abandoned than may fall within the commons should they be confirmed."

In 1816 or 1817, James Mackay enclosed a small piece of ground adjoining the north line of Cerre's grant, and occupied the ground so enclosed by himself and tenant one or two years. Mackay died in the month of March, 1822. William Milburn, who was a clerk in the office of the surveyor general from 1817 until 1839, when he was appointed surveyor general, testified, that there was an official survey of Mackay's grant by Joseph C. Brown; but when that survey was made does not appear, nor is there any record evidence of that survey. He further testified that the first proclamation of the President for the sale of land in the district of St. Louis, which includes the land in question, was made in 1823, at which time fractional section 26, T. 45, N, R. 7 east, was not so surveyed that it could be offered at public sale. In 1822 he, the witness, informed Gen. Rector, then surveyor general, of the unfinished condition of the survey, and also talked with Augustus H. Evans, a clerk in the office, about it. Nothing however appears to have been done at the time on the subject.

At the October term, of the St. Louis circuit court, for the year 1822, Jno. Mullanphy commenced an action of debt against James Mackay's executors, and at the June term, of the same court, 25th June 1823, he recovered judgment for \$500 debt, and \$232 64 damages, together with costs. An *alias* execution was issued 18th January, 1825, reciting the judgment, and returnable to the first Monday in February, being the first day of the February term, which term was changed to the third Monday of March, by the act of the 3d of February, 1825. On the 21st February, 1825, the sheriff put up advertisements, stating that by virtue of the said execution, he had levied upon, and would sell for cash to the highest bidder, at the court house door in the city of St. Louis, on Thursday, the 31st day of March next, between the hours of 9 and 4, all the right, title, claim, interest, estate and property of James

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Mackay in and to a tract of land immediately south of the city of St. Louis, containing 382 arpents, more or less, bounded south by land of A. Soulard; north, by land of A. Chouteau; and west, by vacant land, excepting that part of said tract which had been heretofore sold. A plat of the whole of said land, setting forth the boundaries thereof, and the part sold, can be seen on the day of sale."

The sheriff's deed, (which though objected to was admitted,) bears date 9th April, 1825, and after reciting the execution, proceeds as follows: "By virtue of which execution, I, the said sheriff, did on the 21st day of February, 1825, levy upon and seize all the right, &c., of him, the said James Mackay, or his estate, or his executors as such in and to a certain tract of land situate, lying and being on the south side of Chouteau's mill creek, containing ten acres and 63 hundredths of an acre, and bounded northward by land of John Mullanphy, and westward by land of Aaron Rutgers, and southwardly by land of the late Antoine Soulard, and designated and known upon the plat, hereunto annexed, as tract number one (No. 1,) and is part and parcel of the tract of 282 arpents, more or less, which is described in the aforesaid advertisement. The courses and distances of the tract of land hereby conveyed will appear from the note on the plat. And the same having been advertised as the law directs, by affixing six advertisements or handbills in the most public places in different parts of my county, at least 20 days before I exposed the same to sale, by virtue of which said execution and advertisement I did, on the 31st day of March, 1825, agreeably to the advertisement thereof, at the courthouse door, during the sitting of the circuit court of St. Louis county, expose to public sale," &c. The deed then states that Henry G. Soulard was the highest and last bidder, and the land is therefore conveyed to him.

Annexed to the deed is a diagram which was furnished by the plaintiff, and was exhibited by the sheriff at the time of sale. This diagram exhibits nine different lots adjoining each other, without any designation of course or distance of any of the lines, nor does it show how the whole is bounded. Beneath the diagram is written "Note. The first tract No. 1, beginning on the west side of the road at a stone in the N. E. corner of Soulard's tract, marked A; thence N. 19 E. 7 20; thence with Mullanphy's line, S. 71, E. 6 85; thence N. 62 E. with Mullanphy's line 6 75; thence with Chouteau's line S. 12, E. 1 75; thence S. 21, W. 11 00, to Soulard's north line; thence with said line N. 26, W. 1 50; thence with said line N. 71, W. 7 00; thence with same line N. 54½, W. 2 75; thence with Soulard's front line in the road S. 35 1-2, W. 0 75; thence N. 71, W. 1 30, across the road to the begin-

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ning at the stone, so as to include 12 49-100 arpents, equal to 10 63-100 acres."

Neither the diagram, nor the note thereto, is signed by any one.

On the 30th April, 1828, a patent was granted to Soulard, under Cerre, for the land originally granted to Cerre. The north boundaries are described as beginning at his N. W. corner, a cedar post, in the southerly boundary of a claim in the name of Mackay, thence S. 71° , E. with Mackay's line, at 3 ch. 82 l.; Mackay's corner in Soulard's garden, 10 ch. 56 l. to a post; thence south 30° east 46 ch. to a post.

On the 20th February, 1833, the new board of commissioners proceeded to act on Mackay's claim, and, after taking testimony, on the 7th Nov. 1833, the board declared the opinion, that the claim ought to be confirmed to James Mackay, or his legal representatives. On the 27th Nov. 1833, the commissioners dated their report to the commissioner of the general land office, in which Mackay's claim is No. 54 of the first class.

On the 5th April, 1834, a survey of fractional section 26, T. 45, N., R. 7, E., made by Sprigg, was recorded in the office of the surveyor general, and a copy transmitted to the register at St. Louis. By that survey, the west boundary is represented as being east of the premises in controversy: commencing at a point in Chouteau's line, near the bridge, and running S. 21° , W. 10 ch. 93 l. to a corner formed by the N. and N. E. lines of survey 1333, distant from the N. W. corner of the same survey 10 ch. 56 l. On the plat there is written, on the west side of the west boundary, these words: "Survey No. 2017. James Mackay 288 arpents—245 acres." Which survey, if any such ever was made, is not in evidence.

On the 5th Sept. 1834, Robert Duncan made application to the register and receiver at St. Louis, for a pre-emption on fractional section 26, and on the 20th December, in the same year he and Augustus H. Evans, then a clerk in the surveyor general's office, entered into an agreement in writing, by which Evans was to have one-half of Duncan's pre-emption, he paying the purchase money. Which agreement was recorded 13th May, 1836.

On the 29th June, 1835, Duncan, by deed, conveyed to Elias T. Langham, who was then surveyor general, several lots, and parcels of land, and among others, the land claimed by pre-emption, lying north of Cerre, east of Mackay, and west of the Mississippi, subject to the agreement between Langham and Duncan.

In Nov. 1835, Langham, the surveyor general, instructed L. M. Eiler, a deputy, to make a survey of Mackay's claim. The instructions were

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in writing, but have been lost or mislaid. Eiler testified, that he was furnished with a number of diagrams, or sketches; he made the survey according to his instruction and the diagrams furnished. A. H. Evans was present at the survey which was made in December and January, 1835-6. The survey was returned to, and approved by the surveyor general, on the 25th January, 1836. The approval was written on the return, and the return, plat and approval recorded in the surveyor general's office on the same day, and is known as the official survey No. 2972, and does not include any part of the premises in dispute. The survey contains, in all, 215 62-100 acres, equal to 253 45-100 arpents; of which 37 40-100 acres, or 43 96-100 arpents lie east, of the east line of the commons. The lines were all run to the established variation of $8^{\circ} 26'$ east. The return is dated 25th Jan. 1836, signed Laurentius M. Eiler, and the approval of the surveyor general written thereon is as follows: "Surveyor's Office, Saint Louis, 25 Jan. 1836. The foregoing survey No. 2972, is this day approved as being conformable to the Spanish survey of Don Santiago Mackay, according to the plat thereof, stated to contain 288 arpents, and recorded in page 434, book B, in the office of the United States recorder of land titles, at St. Louis, Mo." It appears by the certificate of the recorder of land titles, relative to the confirmation to Mackay, that thirty arpents of this tract were claimed before the commissioners; the surplus abandoned by him, as falling within the commons of St. Louis; also that 30 arpents were confirmed, and no more abandoned, than may fall within the commons should they be confirmed. Signed, E. T. Langham.

It was proved by William Milburn, then a clerk in the office, and afterwards surveyor general, that the certificate of Langham was written on the original return, and signed by said Langham, and the whole was recorded on the same day in the office. It happened that in recording the plat, certificate, and description, there was a space left blank because it was not sufficient to record the next return to be registered. Langham was succeeded in the office by Daniel Dunklin, 1836, and he by Milburn, the witness, who continued in office until 1841, when he was succeeded by Silas Reed. He, Milburn, was a clerk under Langham and Dunklin, during the whole period of their service; and no entry was made on the said blank space, until after 1841, when he witness, went out of office. He, the witness, examined the books recently, and found that since the accession of Silas Reed, an entry had been made by him on said blank, which is the same now copied below the plat and description of survey No. 2972, and the certificate of Langham.

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An official survey of fractional section 26, T. 45, N., R. 7, E., was made by L. M. Eiler, deputy surveyor, which was returned and approved by the surveyor general, and recorded in the books of his office in March, 1836. The plat and description were given in evidence by the defendant, and the survey includes the premises in controversy; being bounded west by survey No. 2972, south by survey 1333, N. E. by Chouteau's mill tract, and east by the Mississippi.

On the 25th March, 1836, Langham, the surveyor general, transmitted a duly certified copy of the plat and field notes, of the above survey, to the register at St. Louis, accompanied by a letter of that date, requesting a return of the plat of two fractions of said section 26, previously transmitted to the same office, in 1834, and that the corrected survey, then sent, should be placed on file in lieu thereof; which was done.

On the 20th April, R. Duncan renewed his application for a pre-emption on said fractional section, which was granted on third of May following, and the purchase money paid on the same day.

On the 4th July, 1836, the report of the commissioners, including Mackay's claim, was confirmed with a proviso, that if it should be found that any tract confirmed, *or any part thereof* had been located by any person under any law of the United States, *or* had been surveyed and sold by the United States, the act should confer no title to such lands in opposition to the rights acquired by such location or purchase.

On the 10th Sep. 1836, said fractional section having been previously laid out into lots, and streets, as an addition to St. Louis, Elias T. Langham and wife, by deed of that date conveyed to Christian Ott, the defendant, and Christian Ruff, for valuable consideration, two of said lots, which include the premises sued for. The purchasers immediately took possession of said lots which adjoin each other, and erected thereon two valuable two story stone houses, which they have ever since occupied and possessed.

On the 31st August, 1837, Daniel Dunklin, then surveyor general, appointed Charles DeWard to survey a tract of about two hundred and some arpents of land, confirmed to James Mackay, or his legal representatives, by the act of Congress of the 4th July, 1836. Commissioners' Decision, No. 54. The instructions to DeWard state that "as there is an indefiniteness in the grant both as to quantity, and in the western extension of the survey, also in the locality of the Carondelet road at the time of the grant, we must be governed by the survey executed under Spanish authority, a plat of which, from the recorder's office, forms a part of the accompanying evidence of the confirmation; but as this

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plat is defective in not giving the course, and length of the N. E. boundary, you will, as regards this line, conform to the enclosed plat, copied from the Spanish Register in this office."

"The tract was surveyed under the authority of this office in Dec. 1835, and Jan. 1836, (as represented in the accompanying plat C,) as being conformable to the Spanish survey recorded in the recorder's office. This survey is believed to be correct, except as to the position of the eastern and western boundaries thereof, which seem to be erroneous, for the reason that the surveyor assumed, as the S. E. corner of the survey, the N. E. corner of survey No. 2016, on the present Carondelet road, instead of going to the old road, as represented in the accompanying plat marked D. By running the south boundary the distance called for on the old plat from the assumed S. E. corner, you will see by the plat marked C, that the course of the west boundary is quite different, after allowing for the variation of the needle, from the course of the Spanish plats marked A and B. And you will also see that by running the S. E. boundary from the said assumed corner, it intersects Chouteau's line at 18-88 chains, instead of 17-19 chains (61 French poles,) as set down in the Spanish plat; and that the N. E. boundary is but 12-99 chains, when the plat marked B, copied from the Spanish Register, shews it to be 56 poles, equal to 16 33 chains." Signed Daniel Dunklin.

A plat and description of a survey said to have been made by De Ward, under the foregoing instructions, was given in evidence by the plaintiff as survey No. 3123. When the return was made, does not appear. It commences by stating that the survey was made in December, 1837, but in the description of the first line, which commences 5-54 ch. east of the west line of the Carondelet road, running on the course of Soulard's north boundary, and along it, two calls are made for monuments erected by the same surveyor in 1838, one for the N. W. corner of Soulard's survey, and N. E. of that of M. N. Lebois, and the other for the N. W. corner of Lebois' survey. It is manifest that the survey was not made until late in 1838, or afterwards. It was not approved while Dunklin or Milburn continued in the office of surveyor general. This survey includes the premises in controversy.

On the 5th March, 1838, the defendant was served with a written notice, signed Henry G. Soulard, informing the defendant that he, defendant, had erected a building, and made other improvements on the land bought by him, Soulard, at sheriff's sale, and commanding the defendant to abandon the same forthwith, and to remove himself and all his moveables therefrom. This was followed by a similar mandate signed

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by James G., Henry G., and Benj. A. Soulard, served on the defendant 27th Jan., 1841.

On the 6th August, 1841, Silas Reed, then surveyor general, approved the survey and return made by De Ward. This appears, not by any certificate on the return, but it is so stated by Mr. Reed, in an entry made in June, 1842, touching the survey made by Eiler, hereinafter mentioned.

On the 17th June, 1842, Silas Reed, then surveyor general, made, or caused to be made, an entry in the blank space, which had been left below the record of the plat and description of survey No. 2972, by Eiler, and the certificates thereunder written—which entry is as follows: "Surveyor's office, Saint Louis, 17th June, 1842. The survey of the tract of James Mackay, which is platted, and described on pages 104 and 105 of this book, was executed, it appears, in December, 1835, and January, 1836, under the confirmation of 30 arpents thereof, east of the line of the St. Louis common, by act of Congress of 29th April, 1816, as entered on the report of recorder Bates, of 2d of February, 1816. The said plat and description of the survey of Mackay's tract, are hereby annulled, because it was not executed in conformity with the lines of the Spanish survey of that tract, upon which its confirmation was based, recorded in page 55 of *Registre d'Arpentage*, St. Louis, A, and with the lines of the Spanish survey of the adjoining tract of Auguste Chouteau, on page 19 of *Registre d'Arpentage pour les terres de la dependance de St. Louis*, B, in this office, and which *Registre d'Arpentage*, (books of surveys,) are duly certified by Antoine Soulard, Spanish surveyor general of the province of Upper Louisiana. Nor does it appear that the above signature of E. T. Langham, approving the said survey of Mackay, is the proper hand-writing of E. T. Langham, former surveyor general of the States of Illinois and Missouri. The entire tract of James Mackay was confirmed by the act of Congress of 4th July, 1836, entitled, 'an act,' &c., under decision No. 54 of the late board of commissioners. A survey thereof was made under the late confirmation in September, 1837, conformable to the lines of the Spanish surveys above mentioned, and the same approved on the 6th of August, 1841, as platted and described on pages 204 to 207 of this book." Signed "Silas Reed, surveyor," &c. This certificate was appended to the copy of the survey No. 2972, given in evidence by the defendant, and the whole certified by Silas Reed to have been correctly copied from pages 104 and 105 of record book C, in his office.

It appears that the plat and description of De Ward's survey, was

recorded on pages 204, 205, 206, and 207 of book C, in the office of the surveyor general—when, does not appear—but on the 28th November, 1843, Silas Reed, then surveyor general, made the following entry on pages 322 and 323 of the same book, to-wit:

“Continued from page 207. Surveyor’s office, St. Louis, Nov. 28th, 1843. From the plat and description of survey No. 3123, recorded on pages 204, 205, 206, and 207 of this book, and from the records of this office, it appears that 177 76-100th acres of said survey, are included in the tract designated as ‘common of St. Louis,’ (survey No. 3110 confirmed to the inhabitants of the town of St. Louis by the act of Congress of 13th June, 1812, entitled ‘an act,’ &c.) Therefore in conformity with the provisions of the 2d section of the act of Congress of the 4th of July, 1836, entitled, &c., a certificate of the new location No. 30, is this day issued for 177 76-100 acres, the amount of said interference. The remaining part of the survey, situate outside of the St. Louis common, having been previously confirmed by the act of Congress of 29th April, 1816, confirming the claims embraced in the report 2d Feb., 1816, of F. Bates, recorder, &c.—the interference of 27 2-100 acres of Mackay’s survey with the survey numbered 363, in the name of A. Chouteau, under Laclede Legiste, confirmed on the 7th June, 1810, by the board of commissioners under the certificate No. 363, is on that account excluded from the certificate of new location.”

A certified copy of the plat and description of survey No. 3123, was on the 29th Nov., 1843, issued to F. R. Conway, U. S. recorder of land titles, for his action thereon. This entry was not signed by any one, and does not purport to have been.

In December, 1843, the recorder of land titles issued a patent certificate No. 1174, for that part of survey No. 3123 not embraced within the commons or the survey No. 363, being 44 acres 63-100.

The plaintiff then prayed the following instructions, which were given, and an exception was taken to the giving of them:

1. That the confirmation by the recorder of land titles of a part of the claim of James Mackay, as given in evidence by the plaintiff, embraced all the land east of the line of the commons included in the Spanish survey of Mackay’s claim, as the same has been certified from the office of the surveyor general, and given in evidence by the plaintiff.

2. That the jury in ascertaining the boundaries of the part of Mackay’s claim, east of the line of the commons, will be governed by the actual survey made by the Spanish surveyor, and if that actually passed east of the road, as left between the grants of Cerre and Sou-

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lard, that survey will still fix the rights of those claiming under Mackay, as extending east of that road.

3. That the jury will take the survey of Mackay's claim, as made by DeWard, as the authoritative and correct survey, determining the boundaries of that claim according to the Spanish survey.

The defendant then asked the following instructions :

1. The confirmation by the recorder of land titles to James Mackay, given in evidence by the plaintiff, entitled said Mackay to 30 arpents of land east of the east line of the St. Louis commons, with boundaries to be established by a survey to be made under the authority of the United States.

2. If the jury find from the evidence that the survey made by L. M. Eiler, of the grant to Mackay, given in evidence, was approved by the surveyor of public lands of the United States, for the States of Illinois and Missouri, and recorded by said surveyor in his office, as the official survey of said land, including the part confirmed by the recorder of land titles; that said survey contains 30 arpents or more, east of the east line of St. Louis commons, then said survey ought to be regarded as establishing the boundaries of the land confirmed by the recorder.

3. Unless the jury find from the evidence that the lot in dispute, or a part thereof, is within the boundary of the tract of land claimed by James Mackay before the board of commissioners, as designated on the plat, and described in the certificate of survey filed by said James Mackay, with his said claim in the office of the recorder of land titles, they ought to find for the defendant.

4. If the jury find from the evidence, that prior to, and on the 4th July, 1836, the lot in question was without the boundaries of the tract confirmed to James Mackay by the recorder, and within fractional section 26, township 45, north, range 7 east, as surveyed under the authority of the United States; that the United States, before that day, granted the right of pre-emption in, and sold to Robert Duncan, the whole of said fractional section, then the plaintiffs are not entitled to recover, unless it appears to the satisfaction of the jury, that the said lot in dispute, or a part thereof, is within the boundaries of the tract of land granted to James Mackay on the 9th October, 1799, as designated on the plat, and certificate of survey filed by said Mackay with his claim, in the office of the recorder of land titles.

5. The call in the grant to, and survey for James Mackay, under the Spanish government, for the king's highway as the eastern boundary, ought to be understood to mean a road previously established, laid out or recognized by the lieutenant governor, or surveyor general

of Upper Louisiana, as the public road going from St. Louis to Carondelet.

6. If the jury find that previous to the grant and survey for Mackay, a road was laid out, or established by the lieutenant governor, or surveyor general, between the grants to Cerre and Soulard, as a part of the king's highway, or public road leading from St. Louis, to Carondelet, then the southern boundary of the land granted to Mackay, cannot be extended east of said public road so laid out, established or recognized.

7. If the jury find from the evidence that the whole of the lot in dispute is within the fractional section 26, T. 45 N., R. 7 E., and without the tract confirmed to James Mackay, by the recorder of land titles, that the right of pre-emption in the whole of fractional section was granted to Robert Duncan by the United States, and that said Duncan purchased said fractional section from the United States prior to 4th July, 1836, the plaintiff is not entitled to recover unless the lot in dispute, or a part thereof, is within the original grant and survey in favor of James Mackay.

8. If the jury find from the evidence that what is now called Carondelet Avenue, occupies the space of ground designated on the plat of survey of the grants to Gabriel Cerre and Antoine Soulard, as the road leading to Carondelet, then the southern line of the grant to James Mackay does not extend east of that avenue, unless the jury also find that previous to the 9th October, 1799, there was a public road established or recognized by competent authority as such, eastward of the east line of the grant to Gabriel Cerre, going from St. Louis to Carondelet.

9. The fact, if proved, that there was, prior to 9th October, 1799, a traveled way eastward of what is now Carondelet Avenue, and used by persons going from St. Louis to Carondelet, does not authorize the extension of the southern boundary of the grant to Mackay east of said avenue, unless such traveled way was recognized or laid out as a public road by the surveyor general, or lieutenant governor of Upper Louisiana.

10. Unless the jury find from the evidence that the lot in dispute, or a part thereof lies west of the public road leading from St. Louis to Carondelet, as established or recognized by competent authority, (if they find any such road established,) they ought to find for the defendant.

All these instructions were refused by the court, except the third, and an exception taken to the refusal. The court gave the third with the following addition or explanation, viz: "That the copy of the Spanish

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survey, as taken from the registry of surveys kept by Antoine Soulard, the Spanish surveyor general, is better evidence of the Spanish survey, than the copy taken from the recorder's office." To the giving which, with this addition, and refusing to give it as asked, an exception was taken.

A new trial was asked for on the usual reasons, that the verdict was against law and evidence; weight of evidence; and because the court admitted improper evidence, and rejected proper evidence, and erred in giving and refusing instructions; which motion was overruled, and an exception was taken to that act of court.

The first question presented for consideration, is whether the confirmation of the recorder was for quantity, or whether it was for all the land included in the claim which lies east of the commons. When Mackay's claim was first presented to the board of commissioners for confirmation, it was rejected on the erroneous supposition that it was antedated. Being afterwards laid before the recorder of land titles for confirmation, an objection was interposed to it for the reason that it interfered with the St. Louis commons. The agent of Mackay, to remove the objection, agreed to abandon all of the claim that lay west of the line of the commons, and supposing the remainder, after such an abandonment, would be 30 arpents, as it was entered with the recorder for about thirty, he has the claim confirmed for so much. But to remove all doubt as to the effect of the abandonment, it is expressly stated in the act of confirmation, that only so much is abandoned as lies west of the line of the commons, thus showing that the abandonment was not intended to affect that portion of the claim which did not interfere with the commons. It was, in fact, renouncing all the land covered by the commons. The conflict of the claim with the commons being the inducement to the abandonment, we cannot extend the effect of the act further than the motives which induced it show that it was intended to be carried. It is a rule in the construction of grants that when the quantity is mentioned in addition to a description of the boundaries, or other certain designation of the land, the whole is considered as mere description. The quantity being the least certain part of the description, must yield to the boundaries, if they do not agree. Effect is to be given to every part of the description, if practicable; but if the thing intended to be granted appears clearly and satisfactorily from any part of the description, and other circumstances are mentioned which are not applicable to that thing, the grant will not be defeated, but those circumstances will not be rejected as false or mistaken. We think it may be inferred from the whole terms of the confirmation, that nothing

was designed to be relinquished but that portion of the claim of Mackay which interfered with the commons.

The next and most important enquiry involved in this controversy, is whether a resort can be had to the survey of Mackay's claim on the books in the surveyor general's office, in order to supply the defects of the plat of the survey filed by him with the board of commissioners. It will be recollected that the plat of the survey laid before the board of commissioners, omitted to show the course and distance of one of the lines and the course of another. These omissions do not exist on the plat of the survey of Mackay's claim recorded in the books of the surveyor general; and the question is whether we can resort to those books in order to show what was included in the survey and plat exhibited to the commissioners appointed for the confirmation of land claims? The 4th section of the act of Congress of March 2nd, 1805, provides that all claimants of lands under the French and Spanish governments shall deliver to the recorder of land titles a notice in writing, stating the nature and extent of his claims, together with a plat of the tract or tracts claimed; and shall deliver to the recorder, for the purpose of being recorded, every grant, order of survey, deed, conveyance, or other written evidence of his claim, and the same shall be recorded by the recorder. Did this provision stand alone, it might countenance the argument, that in order to ascertain the extent and boundaries of a claim, recourse must be had, in preference to other sources, to the information in the recorder's office. The 2nd section of the act of Congress of 28th February, 1806, shows how this plat came to the office of the surveyor general. It provides that all the plats of surveys, and all other papers and documents pertaining, or which did pertain to the office of surveyor general under the Spanish government within the limits of the territory of Louisiana, or to any other office heretofore established or authorized for the purpose of executing or recording surveys of land within the said limits, shall be delivered to the principal deputy surveyor of the said territory, (an officer created by the said act;) and no plat of survey shall be admitted as evidence in any court of justice, unless certified by the principal deputy to be a true copy of the record in his office. The 7th section of the act of Congress of March 3rd, 1807, provides that the tracts of land granted by the commissioners shall be surveyed at the expense of the parties, under the direction of the surveyor general, or officer acting as surveyor general, in all cases, when an authenticated plat of the land, as surveyed under the authority of the officer, acting as surveyor general under the French, Spanish or American governments respectively, during the time either

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of the said governments had the actual possession of the territories of Orleans and Louisiana, shall not have been filed with the proper register or recorder, or shall not appear of record on the public records of the said territories of Orleans and Louisiana.

The 6th section of the act of Congress of June 13, 1812, enacts that, in all cases when by reason of the indefinite description of the local situation and boundaries of any tract, the claim to which has been confirmed by the commissioners, the same cannot be ascertained by the principal deputy surveyor, it shall be the duty of the recorder of land titles, on the application of said principal deputy, to furnish such precise description thereof as can be obtained from the records in his office, and the books of the said board of commissioners; and for the purpose of more correctly ascertaining the locality and boundaries of any such tract, the said principal deputy shall have free access, at all reasonable hours, to the books and papers in the recorder's office relating to land claims, and be permitted to take copies or extracts therefrom. The act of February 28, 1806, before recited, having previously transferred the plats of surveys in the surveyor's office under the Spanish government, to the principal deputy surveyor of the U. States, we are not to infer, because he is not directed to examine his own records to ascertain the extent and boundaries of confirmations, that therefore the reference to them, as contemplated by the 7th sec. of the act of 3d March, 1807, was not intended.

Taking the several acts of Congress on this subject together, we are warranted in maintaining that the U. States were anxious to confirm incomplete claims derived from the French and Spanish governments, with the boundaries and extent they had when they first originated; and to effect this end, were willing to resort to all reliable sources of information. The 7th sec. of act of March 3, 1807, before recited, which directs that surveys shall be made at the expense of the parties, when plats shall not have been filed with the recorder, *nor appear of record on the Spanish surveyor's book*, shows that in cases of doubt and uncertainty, reference should be had to the Spanish record of surveys and plats. Under that act if no plat had been filed with the recorder, it is clear that we might have fallen back to the plat in the surveyor general's office. If a resort can be had to the plats of that office when there is no plat with the recorder, on what principle should he be debarred from such a resort when the plat filed with the recorder is defective?

We do not consider that the court was warranted in telling the jury that the plat from the surveyor's office was better evidence than that

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filed with the recorder. For if the plat filed with the recorder had been complete, yet variant from that in the office of the surveyor general, the survey under the confirmation, we presume, would have been in conformity to the plat with the recorder, and in reference to which the confirmation was made. The plat from the office of the surveyor general was auxiliary evidence, by no means better than that furnished by the plat filed with the recorder. If there were nothing in the laws of the U. States on this subject, from which we would be justified in referring to the plat in the surveyor general's office, in order to ascertain the boundaries of this survey, yet the plat and survey filed with the recorder, referring to the surveyor's office by book and page, and on the book and page referred to, finding a complete plat of the survey, we can not yield to the force of the objection to its being used as evidence. So distinct a reference to a book in a public office would seem to incorporate the matter referred to in the certificate of survey, and make it, as it were a part of it. It would certainly give all persons notice who might wish to purchase any land adjoining the survey.

The question next arising in this, is as to the authority of the several surveys which have been relied on by the parties respectively. It will not be necessary to examine the surveys separately and declare their effect, but it is deemed sufficient to state the principles which, in our opinion, are applicable to such official acts, and which must determine their validity and effect. When a survey is made by authority of the U. States, and it is a matter of concern between the government and the grantee only, not affecting the rights of others, there is no ground of interference for our courts. If the federal government will send officers here who will grant away lands without authority of law, it is no concern of our tribunals. But when a right or title to land has passed from the government to individuals, the government cannot revoke or destroy that right, nor can it authorize its agents to do so. The circumstances of the present case, showing how surveys are annulled, and re-surveys are ordered, and approved when made, should satisfy us how chary any court should be in telling a jury that a survey is authoritative and correct, and how dangerous it would be to entrust to surveyor generals the power of determining the rights of individuals by surveys. When the rights of third persons are concerned, a surveyor cannot affect them by a survey. The object of a survey is to locate lands according to the boundaries and descriptions contained in the grant. When the calls of a survey are all ascertained by the grant, and there is no necessity for reference to external evidence to ascertain or identify them, their construction is a matter of law and belongs exclu-

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sively to the courts; but when parol evidence is introduced to ascertain or identify the calls, then it is a question of law and fact, the jury finding the fact, and the court declaring the law. In the case of Cockrell vs. McGuinn, 4 Mon. Rep. 63, Judge Owsly, in delivering the opinion of the court, says: "In cases of boundary which depend upon the swearing of witnesses, it would, no doubt, be incompetent for the court, by any sort of instruction that might be given, to withdraw from the jury a decision upon the weight of the testimony, and the facts which the testimony conduces to establish. The actual position and identity of the boundary, in such a case, would be exclusively a question of fact for the consideration and determination of a jury and not the court."

If the foregoing principles be applied to the case under consideration, it will be found that the third instruction given at the instance of the plaintiff cannot be sustained. In the petition of Mackay for a concession, which is in the French language, the call is for "*le chemin publique*"—the *public road*. In the certificate of survey accompanying the plat of the land conceded, which is in the Spanish language, the call is for "*el real camino*"—the *royal road*. In locating the survey with this call, a difficulty arises from the fact of there being two roads near each other, and the right of the parties to this suit depends on the determination of the question,—which of these two roads was intended by the terms of the concession? Now as there was parol evidence as to the condition of these two roads, and as the use of them by the public, the question as to which was intended by the terms of the concession, was a mixed one of law and fact, and the jury should have found the facts or been instructed hypothetically; and the law, as to the facts, as they may have been found by the jury, should have been declared to them by the court. So the third instruction precluded any objections which the defendant in his argument or otherwise might have made to the plat found in the surveyor general's office. That instruction depriving the defendant of these advantages, and usurping the province of the jury, cannot, on principle, be sustained.

The sources of information enjoyed by this court in relation to the Spanish law concerning public roads, are so extremely limited that the expression of an opinion on the subject will not be hazarded. Another trial may furnish the information necessary. If there were no written law here concerning this matter, usage and custom made the law, or at least are evidence of what it was. In determining this question, we cannot adopt the principle that in the absence of the knowledge of the foreign law, it will be presumed to be like our own. This court must

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take judicial notice of the Spanish laws which formerly prevailed here, and those who have rights depending on those laws, will insist that this should be done. The doctrine that long continued, and uninterrupted use and enjoyment, will confer a right of way, has its foundation in the good sense and reason of the thing, and is familiar to the common law. We cannot think this doctrine, so consonant with the quiet and repose of society, can be long a stranger to the code of any civilized people.

As to the point in relation to the sheriff's deed, it may be remembered that this case does not come within the principle of *Evans vs. Ashley*, decided by this court. The advertisement describes the whole tract of Mackay, giving the boundaries, and states that a plat of the whole of said land, setting forth the boundaries and the part theretofore sold, which would not be sold, could be seen on the day of sale. It was shown in evidence that this plat was exhibited at the sale, on which the parts to be sold were delineated. The point of the objection in this is not that the property to be sold was sufficiently ascertained and declared. The defect in the sale, if any, is that the plats not having been exhibited until the day of sale, it did not appear until that time, what was to be sold, and therefore the requisite notice was not given.

The principle heretofore maintained by this court, is that no property passes by a sheriff's deed but that which is ascertained and declared at the time of sale. But it is not thence to be inferred that every deviation from the law by a sheriff in conducting a sale will make it void. Sales may be set aside for irregularities committed by the sheriff in conducting them, but there is a broad distinction between setting aside a sale on an application made therefor, and treating it as a nullity. See the case of *Rector vs. Hartt*, 8 Mo. Rep. where this distinction is illustrated.

The other judges concurring, the judgment will be reversed and the cause remanded.

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1. From the petition of the defendants, it appears that the sale by Gamble to Julius D. Johnston, was made before the bill was filed by Gamble. Johnston could not then be made a party by the answer. Where the proper parties are not made, and it does not appear on the face of the bill, it should be shewn by plea. If a complainant assign his interest *pendent lite*, the assignee must be brought in by motion.
2. Even if Johnston could have been made a party, no decree for the rents and profits could be rendered against him, the decree in favor of Gamble his vendor, not giving him any rents and profits.

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3. The declaration of a vendor, before he purchased the lot in dispute, are not part of the *res gestæ*, and are not admissable as evidence of the consideration of the sale from him to his vendee, though they are evidence to shew his indebtedness to his vendee.
4. A letter written by a vendor after a sale by him, is evidence against him, though never sent to the person to whom it was directed; but it is not evidence against the grantee.
5. The declarations of a grantor made at the time of executing a conveyance, are part of the *res gestæ*, and are evidence to show the intent of the grantor in executing the deed, as against him, and all persons claiming under him.
6. An omission in an answer to deny a fact charged in the bill, is not an admission of the fact, but it must be proved. Omissions and evasions in an answer, are however, proper subjects of animadversion, and calculated to weaken the force of the answer.
7. When an answer is contradicted in any one important particular, it is deprived of the weight given to an answer.
8. It is improper to instruct a jury that they must believe the answer, unless they believe that the respondent "*swore falsely*."
9. The making of issues in a proceeding in chancery, is a matter of discussion with the chancellor, and should never be ordered, when, in the opinion of the chancellor, the answer is entitled to the same weight as two witnesses, or one witness and corroborating circumstances.
10. When an issue is made, the answer is not evidence for the defendant, unless so ordered by the chancellor, or read by the plaintiff as an admission.
11. An answer not responsive to a bill is not evidence, when replied to, nor is a fact stated by a party, but not upon his own knowledge, entitled to the same weight as one stated upon his personal knowledge.
12. A voluntary conveyance without consideration, or merely for love and affection, made by one who is insolvent, is void as against creditors, although the grantee were ignorant of the insolvency, and innocent of the fraud.

APPEAL from St. Louis Circuit Court.

SPALDING AND TIFFANY, for Appellants.

POINTS AND AUTHORITIES.

1. The letter of Madison Y. Johnson, offered in evidence by the complainants below, tending to prove the first issue, to wit: whether the deed of the lot in question, made by J. H. & M. Y. Johnson, was made with the intent to defraud their creditors, was improperly excluded by the court. 2 Starkie's Evidence, 29, that "all a man's acts and declarations shall be admitted in evidence whenever they afford any

presumption against him." 2 J. C. R. 302; 7 Cowen, 301; 12 Wend. 299, as to other transactions being admissible in such cases.

1. This and other authorities, show that it was admissible on general principles.

2. And the fact that it did not appear, or rather was not *proved* to have been sent to the person to whom it was directed, does not justify its exclusion; 3 Starkie's Ev. 1433. "Writings found in the prisoner's possession, but not published, if plainly by their contents, with a treasonable design, are evidence of such a design, though not published." 1 Burr Rep. 644, Rex v. Hensey, "rough drafts of letters written by prisoner, found in his bureau, admitted as evidence."

II. The testimony of Chase, that before said house and lot were purchased of Shepherd by the Johnsons, James H. Johnson told him that "*he was going to have the house bought for his mother with what he owed her,*" was improperly admitted by the court below.

1. That fact, that James H. Johnson made that declaration previous to 4th September, 1835, the date of Shepherd's bond for the lot, had no tendency to prove him innocent of the fraud, if any, in making the deed on 25th April, 1837, to his mother and sister, especially as the bond, and deed by Shepherd, were to J. H. & M. Y. Johnson, in their own names, and apparently for their own benefit.

2. Nor was it admissible as proof of indebtedness to his mother, as it admits no amount, and on it, no amount of debt could be established; nor is there, independently of the answers in chancery, any evidence of a debt.

III. The sixth instruction asked by the complainant below, was improperly refused.

1. That an answer responsive to bill, is evidence for the defendant, and generally, in order to a decree against him, must be disproved by more than one witness; but may be disproved by its own contradictions, or by circumstances alone; but when not directly responsive, the answer is not evidence. Greenleaf's Evidence, 295,-'6,-'7, sections 258, 251, 260. That two witnesses and circumstances, or mere circumstances alone are sufficient to convict a culprit of perjury, or to disprove an answer in chancery. 2 John Ch'y. Rep. 92. "Though one witness against the direct and positive averment of the answer, be not sufficient ground for a decree, yet if that witness be corroborated by circumstances, it will be sufficient, and the answer may in itself, contain the circumstances giving greater credit to the witness." 9 Cranch Rep. 153, at page 160. That "or one witness with probable circumstances will be required to outweigh an answer asserting a fact

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responsive to a bill, is admitted : But certainly there may be evidence arising from circumstances stronger than the testimony of any single witness. The weight also of an answer must depend in some degree, on the fact stated. Where the defendant cannot know the fact, his answer, though responsive to the bill, is not entitled to the same weight." 8 Mo. Rep. 19, Rountree v. Gordon. An answer in chancery, false in one thing, is not entitled to credit in others. 9 Vesey, p. 275, at pages 282-'3, stating general rule as to weight of the answer as testimony, &c., decided against defendant ; his answer outweighed by witness and circumstances. 11 Wend. Rep. 343. Decision of vice chancellor affirmed by chancellor in court of errors ; though reversed, yet sustained by chief justice, the only judge present, and a large minority, that the answer destroyed its own credibility by circumstances, &c. 1 Dana's Rep. 474, where the answer is responsive, but not on the personal knowledge of the defendant, the rule of two witnesses to disprove, does not apply. 9 Cranch, 153.

IV. The seventh instruction of the complainant below, should have been given.

1. Like the sixth, it pointed out a circumstance, which if it existed, (and whether it existed or not, was left to the jury) certainly ought to lessen the weight of the answer in testimony.

2. It calls upon the court substantially to say, that if the answer were found by the jury to be untrue in the points mentioned, they were authorized to give less credit to the answer, than by law they were otherwise bound to do.

V. The first instruction given for the defendant was wrong.

1. It assumes that in the matters mentioned therein, the answer was responsive to the bill, which was not the fact. 1 John. R. 580, at page 589, Pendleton, counsel, alledges that the answer was only responsive to the bill, and shows how : and at page 590, Spencer, justice, decides that the bill alledging that the consideration was a full and valuable one, the answer should have been in the affirmative, or negatively merely, and was a departure in saying the note was *usurious*; and of course the defendant was bound to prove the fact of usury, and his answer is no evidence of it. 1 Munford's Rep. 373. Roane says that to permit an executor when called on to account, and say what were the particulars and amount of the estate to swear it away, would be monstrous, &c. 1 Dessausure 589. Executor's swearing to payment of legacy, no proof thereof, especially as he is swearing to the act of another. 5 Har. & John. 372; 1 Wash. Rep. 224.

2. That instruction gives a summary of the answer of Hannah John-

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son, and tells the jury to believe it unless found *false* by two witnesses. Under that instruction, the jury would naturally think they must believe all she says in her answer, of the subjects mentioned in the instruction.

3. It puts the matter to the jury improperly. That they could not find for complainant without its being proved that Hannah Johnson had "*sworn falsely*," for the jury might think she had sworn *mistakenly*, not "*falsely*;" and the phraseology of the instruction requires proof by two witnesses that she was *perjured*. This was calculated to give a wrong impression, and to mislead.

VI. The second instruction is liable substantially to the same objections as the first.

VII. The third instruction of defendants is wrong.

1. It applies the same rule to the *whole* of these answers, not merely to the points enumerated in the first instruction, but says in substance, that their answers to the charge of the bill, are to be held true unless disproved by two witnesses, &c. 6 Mo. R. 267, 279.

2. It leaves it to the jury to find out what portion of their answers do apply to charges of the bill; thus leaving the matter of law to the jury. 6 Mo. Rep. 267, 279.

3. This instruction is calculated to mislead the jury. They naturally infer from it that the same weight is to be given to each answer, to wit: that of two witnesses, so that there would be what is equivalent to eight witnesses swearing to the same story, set up in the answer, which must be disproved by twice as many.

4. It is wrong in requiring the jury to give the same credit to the answer of each, whether they knew the facts personally or not, as it is evident that they did not of their own knowledge, know all that is stated in their answers.

VIII. The fifth and sixth instructions of the defendants are wrong in declaring that the words and acts of James H. Johnson, and Madison Y. Johnson, or either of them, could not prejudice the rights of Hannah or Isabella Johnson, unless they, Hannah and Isabella, at the time, were knowing to, or assenting to the same, or have since assented to it, and in excluding Polk's testimony.

1. Because Hannah and Isabella claimed under J. H. and M. Y. Johnson, through their deed.

2. On the first issue, the only inquiry was, whether that deed was made to defraud the creditors, and the acts and sayings of the grantors, were the only instruments of evidence to show their fraud in making it.

3. Because if the deed were made without a good and valuable con-

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sideration, it would have been void, if intended by the grantors to defraud creditors, whether the grantees were privy to the fraud or not; and it belongs to the jury to determine whether there was a valuable consideration in making that deed.

4. The instruction therefore tells the jury that there was a valuable consideration for the deed, and prohibits the jury from passing on that fact.

5. Because the instruction requires both Hannah and Isabella, to assent to words or acts of the grantors in the deed, in order to be prejudiced; whereas Isabella paid no consideration, was a volunteer, and her assent would have nothing to do with it. Besides she was a child, and could not assent.

6. The instruction is wrong in this also, that it requires the "assent" of Hannah and Isabella to the *words* and *acts* of J. H. & M. Y. Johnson, in order that these *words* and *acts* should prejudice them; whereas the fraud of the Johnsons in making the deed, would affect the rights of Hannah and Isabella, if Hannah had notice of the fraud at the time of taking the deed. *Assent* was not necessary to the *acts* or *words* manifesting the fraud, or even knowledge of such acts or words, if Hannah were chargeable with a knowledge of the *fraud*. 1 Story's Equity, 363, sec. 369; 1 Story's Equity, 341, sec. 349, as to general doctrine; 1 Story's Equity, 345, sec. 353, &c.; 1 Story's Equity, 355, 359; 1 Story's Equity, 354 sec. 362; 3 Bacon's Abr. 311-'12; 8 Wheat. 228; Roberts on Fraud, Con. 13, 14, 15, 16, 17, 18; 4 Cruise 519, 531, sec. 55; 3 Mo. R. 302; 4 J. C. R. 450.

These reference show that voluntary conveyances by a person indebted, are fraudulent and void, as to creditors; and that conveyances for valuable consideration, when made to defraud creditors, and the grantee is cognizant of that fact, are void, not being *bona fide*, and that the want of a fraudulent intention on the part of the grantee makes no difference.

7. What J. H. Johnson said to Polk, *would* prejudice Hannah Johnson, provided he made the deed with the intent to defraud his creditors, and she at the time had notice of the fact, as in that case there would be wanting *bona fides*.

15 John. Rep. 162; 5 Cowen, 67, as to Voluntary Conveyances.

12 John. Rep. 320; 12 Wend. 41. Conveyances void if for full value, if value, if not *bona fide*.

11 Wend. 533. Even where it is *bona fide* on the part of the grantee and for full value, but is for previous debt, it is void.

IX. The instructions were conflicting, and calculated to mislead the

jury; and the first and second ought not to have been given, as the jury could not act properly upon such a rule. They could not apply it; the chancellor alone is able to apply it.

X. The matter of the bill of review was improperly taken as confessed against the complainant, Gamble.

1. Because no deed, *pro confesso*, is authorized against a complainant.

2. Because if it could have been taken at all, it should have been in the suit of the Johnsons vs. Gamble & Johnston.

3. Because if the matter of the bill of review could have been taken *pro confesso*, the decree should have been a decree *nisi*. 1 Mo. R. 348.

XI. The motion to set aside the order appointing a commissioner, should have been sustained for the reasons therein set forth, to-wit: that in the suit of Gamble vs. the Johnsons, it was illegal to proceed against the complainant, Gamble, as if he had been a defendant.

XII. The court improperly overruled the motion, to hear testimony at the final hearing.

XIII. The final decree was wrong.

1. It should not have been against Julius D. Johnston, who was party to the suit; or if he were, not in such a position as to be proceeded against by the defendants in the same, in the manner adopted. If he were co-defendant with the other Johnsons, they had no right to a decree against him; and if he were complainant, the defendants could not have a decree for rents against him.

2. Julius D. Johnston was neither complainant nor defendant in the suit in which the decree is entered against him.

1 Smith's Chancery, 423. That decree binds only parties to the suit.

1 Smith's Chancery, 293, Ib. 301. Addition of parties by amending the bill.

3. The bill of review was a mere statutory proceeding to open the decree and let in the defendants to defend. When this was accomplished, it was *functus officio*. Story's Equity Pleading, 320, sec. 403.

2 Smith's Chy. 50. That bill of review is in nature of a writ of error, and lies only after a decree has been enrolled, so that it is too late to apply for a re-hearing. Revised Code of 1835, Chancery Practice.

LESLIE & TODD, for Appellees.

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POINTS AND AUTHORITIES.

I. The court did not err in excluding the letter of Madison Y. Johnson.

1. Because the object of the bill was to destroy and nullify the title of the grantees. Hence the acts and declarations of the grantors subsequent to the conveyance, were inadmissible to affect the title of the grantees. This letter is such, being written July 21st, 1837, the conveyance being made April 25, 1837. It was also the act of only one of the grantors not proved to have been known to the other, or the grantees. That the subsequent acts and declarations of vendors cannot be admitted in evidence to affect the title of the vendees not proved to be assenting to the same. Vide Cowen & Hill's notes to Phillips' Ev., part 1, p. 655, and following, 1 Mass. Rep. 165; 12 Mass. Rep. p. 439.

2. Because the letter was never sent.

II. The court did not err in admitting the statements of James H. Johnson to Chase, at the time he was negotiating for the purchase of the lot, to-wit: that he was going to buy the lot for his mother with what he owed her.

Because they were of the "*res gestæ*." Cowen & Hill's notes to Phillips' Evidence, part 1, p. 592, and following. 11 Pick. Rep. p. 362, 469.

III. The court did not err in giving the defendant's instructions.

Instruction 1, correctly declares the rule of law as to the effect of a responsible answer. 8 Mo. Rep. p. 19; 2 Story's Equity Jurisprudence, p. 743; 1 Cow. Rep. p. 744, n. a.

The answer of Hannah does say that she had separate means of her own, and that out of the same she furnished the means for purchasing the lot, and that she acquired it *bona fide*. See her answer. See also 3 Eng. Cond. Chy. Rep. p. 31. And this was responsive. For the bill charges that she "was without any separate fortune of her own;" that the conveyance was made to her "*without any real consideration whatever*," and fraudulently, and asks if anything were paid, then "*how and in what manner?*" Or in other words, the bill charges that Hannah had nothing, paid nothing, but obtained the conveyance fraudulently. And she answers she did have money and enough; that with it she bought the lot, and that, too, fairly.

As to what an answer should contain, and when responsive, vide Mitford, p. 109, n. 1; 1 J. C. R. 103; Story's Eq. Plead. p. 654 and following; 3 Paige's Ch. Rep. p. 212; 6 Wend. Rep. 22. The case in Wend. is quite in point.

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Instruction 2 was rightly given. Because the answer of Hannah does entirely meet, and falsify the charges of want of consideration, and of fraud; and as to the effect thereof, it has been already shown that the rule of law is correctly enunciated. If these premises be true, then the conclusion of said instruction follows of course.

Instruction 3 was rightly given. Because the rule of law therein stated as to the effect of the answers of James H., Madison Y., and Joseph Johnson to the charges of the bill, is correctly laid down as already shown. And it may be here remarked, that, in this instruction, the answers, so far as responsive to the charges of the bill, are given to the jury under the said rule of law as to their effect, without any specification, or condensation of their substance and tenor. So that if there was error in the court in stating in the first instruction the tenor and substance of the answer of Hannah, it does not exist in this. Now these answers do deny the charges of the bill, that Hannah had nothing; that the conveyance was made without any valuable consideration, and for a fraudulent purpose, and do aver the contrary with sufficient particulars. And if the jury believe their answers true, then the whole equity and foundation of the bill are destroyed. That the jury did, their verdict proves.

Instruction 4 was rightly given. Reference to authority is not deemed needful to show this.

Instruction 5 was rightly given. See authorities under point I.

Instruction 6 was rightly given, on the assumptinn that the 5th was.

Instruction 7 was rightly given. Reference to authorities is deemed useless to show this.

IV. The court did not err in refusing the 6th and 7th instructions of the complainant. It is not error as to the 6th; because.

1. It is immaterial from whom, or where Hannah got her private means.

2. Because the bill does not charge that if she had private means, she so obtained them as not to make them a valuable consideration to her grantors, as to their creditors, nor does it ask her from whom or where, nor lay any foundation for such an interrogatory. And even if the bill had, as no exception was taken to the answer, it is to be deemed satisfactory to the complainant, and that he did not wish, or think it advisable to insist upon her saying from "whom" or "where." Any supposed doubt or obscurity as to a particular part of an answer, cannot be deemed a circumstance to impeach it in favor of the party answered, when, having the power, he does not express dissatisfaction, or attempt to cause the doubt removed, or the obscurity cleared away. A

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contrary rule of law would serve to entrap the honest, and expose him to the infamy of convicted, or the cloud of suspected perjury, by reason of the honest mistake, omission, or ignorance of himself, or solicitor.

3. Because the desired effect of instruction 6th is secured in the 2nd of the complainant's instructions.

The 7th instruction was properly refused.

1. Because there was no foundation for it, so far, at least, as the title of Hannah and Isabella was concerned.

2. Because the purport of this instruction is contained in those given. 3 Mo. Rep. 339.

V. The instructions, taken together as a whole, contain a correct exposition of law applicable to the case, and were sufficiently ample and particular for the guidance of the jury to a just and legal conclusion. This is sufficient. 7 Mo. Rep. p. 128 8 Mo. Rep. p. 339.

VI. There was no error in refusing the motion for a new trial.

1. Because a court of chancery is not obliged to direct an issue. (Blakes' Ch. p. 374; 2 Mad. Chy. 474; 2 Smith's Chy. p. 75,) and when it does, it is to inform its own conscience. (2 Ves. Sen. p. 553; 9 Ves. p. 169; 11 Ves. p. 52; 3 Swanston, 344-5; 2 Paige Rep. 487-8.) And whether it will grant a new trial, is, with it, a matter very much of discretion. (2 Ves. Sen. 553; 9 Ves. p. 169; Blakes' Chy. 375; 2 Mad. Chy. 480.) And it may refuse or grant a new trial when a court of law must do otherwise. (2 Ves. Sen. 553; 9 Ves. 169; 11 Ves. 52; 3 Swanston, 345, 3 Eng. Cond. Chy. Rep. 31.) And on a motion therefor, if, with all the testimony, together with the instructions and pleadings before it, it shall be satisfied with the verdict, it may refuse a new trial; although improper testimony admitted, or proper excluded, or proper instructions refused, or the effect of the answers inaccurately stated. 9 Ves. 169; 11 Ves. 52; 3rd Swanston 345; 3 Eng. Cond. Chy. Rep. p. 31; 2 Paige Chy. Rep. p. 487-8; Blakes' Chy. 376; 2 Mad. Chy. 481; 2 Smith's Chy. 84.

2. Because the verdict is amply sustained, at least so far as the rights of Hannah and Isabella are concerned, even with the letter in and the instructions 6th and 7th complainant given. The evidence would not by any means greatly preponderate in favor of complainant as is required. 6 Mo. Rep. page 61. And in chancery the complainant must fail even though the testimony were equally balanced. 6 Paige, 583. So that neither in law nor in equity was the complainant entitled to a new trial.

3. The complainant could not be benefitted by a new trial. 7 Mo. Rep. 494.

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That it does not follow that because love and affection are expressed in a deed with a money consideration, that it is fraudulent as to creditors. See 11th Wheat. Rep. 199; 1 Rand. Rep. 219; 7 Pick. 533.

VII. The court did not err in acting on the supplemental matter of the bill of review. Story's Equity Plead. p. 334; Mad. Chy. Prac. p. 542. For Julius D. Johnston had become a party interested, and therefore should be made a party. Story's Eq. Pl. p. 334; Mitford, p. 89; 7 Paige Ch. Rep. p. 287.

If the bill were defeated, the defendants were entitled to be restored to every thing they had lost by the acts of Gamble and Johnston. This could not be done, unless the rents and profits of the property during the ouster, and the possession thereof wrested away, were restored. Besides, when the court of chancery once gets jurisdiction of a case, its subject matter and the parties interested, it will and ought to do complete justice to all the parties, and from its abhorrence of litigation and multiplicity of suits, it will not dispose of a part, and for the settlement of the rest turn the parties over to the other courts. 10 J. R. p. 587; 4 J. Ch. Rep. p. 609; 1 Story's Com. on Equity, p. 82 and following; and 436 and following.

VIII. The court did not err in taking the supplemental matter of the bill of review as confessed against Gamble. For it was not answered, pleaded or excepted to. Also, because the bill of review prays that the court will hear the supplemental matter when it re-hears the original.

IX. The court did not err in refusing to set aside the order of reference, for the reasons under point VII.

X. The court did not err in refusing the motion of Gamble, on the final hearing, to hear the testimony offered by him to support the allegations of the bill.

No additional testimony was offered, and the court had already considered fully the testimony on the motion for a new trial, and passed upon it.

XI. There was no error in making Julius D. Johnston a party to the final decree, for he was made a party to the proceedings under the bill of review, and duly brought into court.

XII. It was properly decreed that Julius D. Johnston should pay the money decreed, and restore possession of the property: for the amount was agreed to, and the possession, as alleged in the bill of review, never denied. Also for reasons under point VII. The decree shows both Johnston and Gamble before the court, and parties participating.

XIII. If any error in any part of the decree below, it is deemed com-

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petent for this court to render such decree as should have been rendered below.

Scott, J., delivered the opinion of the Court.

This was a suit in equity commenced in June, 1840, by Gamble, against Johnson and others, for the purpose of setting aside a conveyance as fraudulent against creditors. The bill states that James H. and Madison Y. Johnson, partners in carrying on the business of druggists, were the owners in fee of a lot in St. Louis, which was conveyed to them by D. Shepard, by deed dated 22d April, 1837. That the Johnsons being indebted to J. Folger, he, on the 13th October, 1837, sued out an attachment against them, which was levied on the lot in controversy. That on the 10th May, 1838, judgment in that suit was rendered for Folger, on which an execution issued, under which, on the 10th July, 1838, the lot was sold to Gamble for the sum of \$1250. That at the time of the commencement of the said suit against the Johnsons, they were utterly insolvent. That whilst in this situation, and with a view to defraud their creditors, on the 25th April, 1837, for the pretended consideration of natural love and affection, and for the sum of \$5000, the Johnsons executed, to their mother, Hannah Johnson, a conveyance of the lot in dispute, to be enjoyed by her during her natural life, with remainder in fee to Isabella Johnson, her infant daughter. That Hannah Johnson, at and before the time of the said conveyance, was in poor circumstances, without any separate fortune of her own, and unable to pay the sum set forth as the consideration for the deed. That her husband, Joseph Johnson, was at that time, and long previous had been insolvent. After making J. H. and M. Y. Johnson, the sons, and Joseph Johnson, the husband, Hannah Johnson, the mother, and Isabella L. Johnson, the daughter, parties, the bill prays that the deed of J. H. and M. Y. Johnson, to their mother and sister, may be set aside.

A summons was issued on this bill, which was returned that none of the defendants were found, and thereupon an order of publication was awarded. At the November term, 1840, the court appointed T. B. Hudson guardian *ad litem* of Isabella Johnson, the infant, on motion of the complainant; and, the order of publication having been proved, a decree *nisi* was taken against all the other defendants. Hudson, the guardian of I. Johnson, put in an answer disclaiming all knowledge of the matters contained in the bill, and requiring proof of the same.

Afterwards, at the March term, 1841, the court directed the com-

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plainant to file his allegations as to the matter of fraud alledged in the bill in the execution of the deed by J. H. and M. Y. Johnson to their mother and sister, and touching the privity of the said grantees to the fraud. These allegations being submitted to a jury, they found that the deed was without consideration, but that Hannah and Isabella Johnson were not privy to any fraud committed by the Johnsons in making the deed. On this a decree was rendered in favor of the complainant, and the deed was set aside as fraudulent against him.

Afterwards, at the November term, 1844, Albert Todd, having been appointed guardian *ad litem* of Isabella Johnson, the defendants filed a petition against Gamble, the complainant, and Julius D. Johnston, setting forth substantially the proceedings above had against them, and that after the sale of the lot to Gamble, he went into possession thereof, and there remained, receiving the rents and profits until October, 1839, when he sold and conveyed the said lot to J. D. Johnston, who has ever since been in possession thereof, receiving the rents and profits, which are worth \$500 per annum; and alledging that the foregoing final decree is wrong and unjust, because according to the best of the knowledge, information, and belief of the said Joseph Johnson, Hannah Johnson, and Isabella Johnson, the said J. H. and M. Y. Johnson made the said deed *bona fide*, and for a valuable consideration, and without any intent on the part of the grantors to hinder and delay their creditors; and that Hannah Johnson paid a valuable consideration, and was not knowing to, or privy to any fraud on the part of the grantors in making said deed; and praying that the said Gamble and Johnston may answer their petition; that the suit and proceedings in said cause may be revived against the petitioners, or that the said Gamble and Johnston show good cause to the contrary, and that the decree may be reviewed, reversed, and set aside; that the cause may be heard on the supplemental bill, that J. D. Johnston may be made a party, and that an account of the rents and profits of the lot may be decreed, &c., &c. Revised code 1835, page 516.

Upon this a subpoena was issued, which was served upon Gamble and Johnston.

Afterwards, at the November term, 1844, a motion was made by the defendants in the original suit, to set aside the decree entered therein, and the decree was afterwards set aside.

Afterwards in January, 1845, the defendants put in their joint answer to the original bill, in which the two Johnsons admit their indebtedness at the time of the conveyance to them by Shepard, and at the commencement of the suit by Folger, and at the same time to various persons

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to a considerable amount, but had debts due to them greatly more than sufficient to pay all demands against them, and from their inability to collect their debts they were compelled to make an assignment. J. H. and M. Y. Johnson admit that they executed the deed to their mother for the lot in dispute. All the defendants deny that it was made upon a pretended consideration, and alledge that \$3500 was the consideration for the same, which sum Hannah Johnson had advanced and lent to J. H. Johnson, to carry on the business of the firm, with the express understanding that when said Hannah should select a house and lot in St. Louis, suitable for a residence, the money should be applied in purchasing it. That the house and lot mentioned in the bill having been selected by the said Hannah, it was purchased from Shepard on a credit for part of the purchase money, and a title bond was executed to J. H. and M. Y. Johnson, conditioned to make them a deed when the whole of the purchase money should be paid. The money having been paid, a deed was executed to J. H. and M. Y. Johnson for the lot, who immediately thereafter conveyed it to their mother. That she had separate means of her own, given to her for her own use and benefit; but that Joseph Johnson, her husband, was unable to pay his debts, having failed in business. That the consideration of five thousand dollars mentioned in the deed was inserted without the knowledge or assent of Hannah Johnson, and that the real consideration was \$3500. All fraud is denied, and it is maintained that the deed was not made with a view to defraud creditors.

To this answer, a replication was filed, and the court directed the following issues, to-wit:

1. Whether the conveyance of the lands and tenements mentioned in the complainant's bill, by J. H. and M. Y. Johnson to Hannah Johnson for life, with remainder in fee to J. L. Johnson, was made or contrived with the intent to hinder, delay, or defraud the creditors of the said J. H. and M. Y. Johnson.

2 Whether the purchase of the lot in controversy, conveyed by the said J. H. and M. Y. Johnson, to Hannah and Isabella Johnson, was made *bona fide*, and upon a valuable consideration on the part of the said Hannah.

These issues were found for the defendants. The supplemental matter of the bill of review, was taken for confessed against Gamble and Johnston, and a commissioner was appointed to take an account of the rents and profits.

Evidence was given of the great indebtedness of the Johnsons about

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the time of the execution of the deed, by judgments and otherwise. In September, 1837, J. H. Johnson took the benefit of the insolvent laws.

Lott, a witness, testified that he was a partner of the Johnsons,—he went into business with them in 1836, as a co-partner; he put into the concern nine or ten thousand dollars. That he quitted it in the fore part of April, 1837. That the Johnsons were to take all the property, and to pay all the debts. They executed their notes to him for \$11,500, payable in three equal instalments,—a dividend was paid only on one of the notes. They promised him security, but never gave it. He expected the house and lot to be conveyed as security, but it was about that time conveyed to Hannah Johnson. Hannah Johnson sent for witness, and she said she felt troubled in mind about affairs, and told him not to feel uneasy, that she would pay him, and that the property was made over to her.

M. Brotherton, the sheriff of St. Louis county, testified that in Oct., 1837, he had an attachment against the goods of the Johnsons. There were also attachments against their effects in the hands of constables, and there was an assignment of the property. In the fall of 1837, all the family of the Johnsons left St. Louis.

T. Polk testified that he was called upon to draw the deed from J. H. and M. Y. Johnson to H. and I. Johnson. That J. H. Johnson told him at the time of drawing the instrument, that he wanted the lot to be conveyed to his mother for life, with remainder to his sister. Said he was prosperous, and was paying for the education of his sister. That the consideration of five thousand dollars was inserted at his, Polk's, suggestion, as proper to negative any resulting trust. Demands against the Johnsons were placed in his hands for collection, but he never did any thing with them, as he considered that they were desperate.

A letter written by M. Y. Johnson, bearing date 21st July, 1837, and addressed to Dr. Sam'l L. Adams, who was called *uncle*, New Washington Indiana, written on letter paper, and directed in the usual manner that letters are, was offered in evidence. This letter stated that in consequence of an apprehended failure in business, the conveyance to their mother and sister had been made; and sentiments were therein avowed which showed that the writer was utterly destitute of all integrity. This letter was excluded by the court, and the exclusion was excepted to.

The defendants read their answer in evidence.

Mrs. Childs, an acquaintance of Mrs. Johnson, testified that about a

year before the Johnsons left St. Louis, she went with Mrs. Johnson to examine the house and lot in dispute, which was not long before the family went into possession of it. She never saw Mrs. Johnson with but small sums of money. She knew Mrs. Johnson was in search of a house for a residence, and she recommended the one in dispute to her.

W. F. Chase, a witness, testified that he was consulted by the Johnsons in relation to the purchase of the house and lot, and that he was employed to examine the title. That J. M. Johnson said he was going to have the house bought, for his mother with what he owed her. This portion of the witnesses' testimony was objected to, but the objection was overruled and exceptions taken. The witness further testified that he did not draw up the contract; that he did not actually examine the title; that he advised the Johnsons to make the purchase, but not in their own names, as it would be productive of litigation.

The bond of Shepard for a title to the lot, was dated 4th September, 1835.

Dr. Davy, who lived in the family, said that he did not know of Mrs. Johnson's having loaned money. Never saw any loaned. But when Johnson got into trouble, he went to her and his necessities were relieved. That he knew of Mrs. Johnson's going out, spending money, and getting articles of great value.

This is as much of the evidence in the cause as is deemed material to be stated, in order to a correct understanding of the case.

The court, at the instance of the complainant, gave the jury the following instructions :

1. That the answer of the defendants is evidence in this case, but liable to be rebutted by the testimony of one witness and circumstances; and the jury are to judge from the whole of the evidence, whether the allegations of the answer are outweighed or rebutted by the circumstances and other testimony in the case.

2. That the jury have the right to examine and compare the statements of the answer of the defendants, and if they find absurdities, contradictions, or inconsistencies, or concealments therein, they have the right to draw inferences unfavorable to the truth of said answer therefrom.

3. That if the jury believe from the evidence that J. H. & M. Y. Johnson conveyed the lot in question to their mother, Hannah Johnson, with remainder to their sister, without a valuable consideration, and that they were then in embarrassed circumstances, and owed debts to a large amount, which they were unable to pay *then* or *since*, then such

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conveyance was fraudulent as to the creditors of said J. H. and M. Y. Johnson, although the said Hannah Johnson was ignorant of any fraud in the transaction.

4. That if the said deed from J. H. and M. Y. Johnson to Hannah Johnson were made by them for the purpose of delaying, hindering, or defrauding creditors, then it was void :—unless they also believe from the evidence that a valuable consideration was given by the grantee, Hannah Johnson, therefor, and that she then, or before, had no notice, or knowledge that said Johnsons, her sons, *were* attempting by that transaction to hinder, or delay, or defraud their creditors, or some of them.

5. That if said deed was made by the said J. H. and M. Y. Johnson, for the purpose of hindering, delaying or defrauding any one of their creditors, and is void therefor as to that creditor; it is also void as to all their creditors; 3 Bac. 312, 314.

The complainant then asked the following instructions :

6. That the failure of the answer of defendants to state from *whom* or *where* the alleged private means of Mrs. Hannah Johnson were derived to her, is a circumstance tending to impeach the character of her answer as testimony.

If the jury believe from the evidence that the conveyance mentioned in the issue, was made in a manner and for a consideration different from the statements of the answer, they are authorized to consider that as a circumstance impeaching the credibility of the answer.

Which were refused; to which refusal an exception was taken.

The defendants then asked the following instructions :

1. The jury are bound to believe the answer of Hannah Johnson, that she had separate means of her own, and that out of the same she furnished the means for purchasing the lot in question, and that she acquired said lot *bona fide*, to be true, unless she be proved to have sworn falsely, in her said answer, by two witnesses, or at least one witness, and other additional corroborating evidence, sufficient to satisfy the jury that she has sworn falsely. And her statements are entitled to the support of all the evidence in the case corroborative of her answer.

2. Unless the jury find from the evidence that said Hannah has sworn falsely, or that her said answer is outweighed by legal evidence, under the rule and direction stated in the first instruction, they ought to find that the lot in controversy was conveyed to said Hannah and Isabella *bona fide*, and for a valuable consideration.

3. As to the truth or falsity of the answers of James H., Madison Y. and Joseph Johnson, to the charges in the plaintiff's bill, the jury are

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bound to be governed by the same rule, as contained in the first instruction.

4. A debtor in failing circumstances may lawfully prefer one creditor to another in full.

5. The words and acts of James H., Madison Y., and Joseph Johnson, or either of them, prejudicial to the rights of Hannah and Isabella to this lot, under the conveyance in evidence, cannot affect those rights unless they, Hannah and Isabella, at the time were knowing to and assenting to the same, or that they have since assented thereto.

6. Under the rule contained in the last instruction, what James H. Johnson said to Mr. Polk cannot affect the rights of Hannah and Isabella Johnson to the lot in question.

7. Fraud is a fact not to be presumed, but to be proved, and the jury should not find fraud unless proved. Fraud may be proved, however, as well by circumstantial as positive evidence.

Which were given; to the giving of which the complainant excepted.

A motion was made to set aside the order appointing a commissioner to take an account of the rents and profits, which was overruled, and a decree was entered dismissing the bill of complainant, Gamble, and against Johnson for the rents and profits; from which they appealed to this court.

The first point we will notice in this case, is that growing out of the supplemental matter stated in the bill of review, relative to the sale to and occupancy of the disputed premises of J. D. Johnston. The sale, it seems, was made to Johnston in October, 1839, and the suit was commenced by Gamble in June, 1840. The contract between Johnston and Gamble was not in evidence. If, by the contract, Gamble had divested himself of all interest in the subject of the suit, that fact should have been shown to the court in a proper way. If the proper parties are not made to a bill, the defect cannot be supplied by an answer making new parties. If the want of parties to a bill is apparent upon the face of it, the omission may be reached by demurrer; if it do not so appear, then the matter may be brought to the notice of the court by plea. Admit that the defendants might have been restored, by a bill of review, to all of which they were deprived by the original decree. No rents and profits were given to Gamble by that decree. Gamble took possession of the lot in dispute on the 10th July, 1838, immediately after the sheriff's sale, and continued in possession until he sold to Johnston, in October, 1839. The defendants had an older deed than Gamble; their remedy at law was clear; and they had no right to come into

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equity to recover their rents and profits. The proper way to view this matter is to drop all consideration of the sale to J. D. Johnston by Gamble. Could the defendant have recovered the rents and profits from Gamble in this suit? The principle is not perceived on which it could be done. The rule that when a court of equity obtains jurisdiction of a cause for one purpose, it will retain it for all other purposes, and do complete justice between the parties, is not applicable to this case. The supplemental matter would not have been the subject of a cross-bill; *Calverly vs. Williams*, 1 Ves. Jun. 211; *Story's Equity Pleadings*, 317. If the rents and profits could not have been recovered from Gamble in this suit, on what principle can they be recovered from Johnston? Lord Redesdale, in his treatise, p. 90, says, that a supplemental bill may likewise be added to a bill of review, if any event has happened which requires it, and particularly if any person, not a party to the original suit, becomes interested in the subject, he must be made a party to the bill of review by way of supplement; *Equity Draughtsman*, 445; *Story's Equity*, 334. Here nothing has transpired since the original decree varying the condition of the cause. The sale to Johnston was made before the commencement of the original suit. It is no new matter. Even if Johnston could have been made a party in the way adopted, he standing in the shoes of Gamble, there could have been no decree against him for the profits. It seems that if a complainant assigns his interest in the suit *pendente lite*, if the defendant wishes to have the suit brought to a termination, his proper course is to apply to the court for an order that the assignee proceed and file a supplemental bill, in the nature of a bill of revivor, within such time as shall be prescribed by the court, or that the bill in the original suit be dismissed, of which application notice should be given; *Sedgwick vs. Cleveland*, 7 Paige, 287.

The testimony of Chase, that before the house and lot were purchased, he heard J. H. Johnson say that he was going to have the house bought for his mother with what he owed her, which was admitted by the court, is complained of as error. This declaration of Johnson was made before the contract with Shepard for the lot, which took place on the 4th Sept. 1835. The lot was not conveyed by the Johnsons to their mother until April, 1837. It is very clear that when a party's declarations afford any presumption against himself they may be used as evidence against him. But it is always for his adversary to say whether he will use them or not. When a party is in possession of land, *prima facie*, he is the owner in fee, and any declarations made by him against his interest, and repelling this presumption, shewing the nature of his

possession, and that it is not such as the law presumes, are regarded as *res gestæ*, and may be given in evidence against him and those claiming under him. So when an act is being done, the declarations made at the time, shewing the nature of the act, the design and intention of the doer, are admitted in evidence as part of the *res gestæ*. Such declarations made by one in possession, or in performing an act, are not regarded as hearsay, but as verbal facts illustrating the act which they accompany.

The declaration, it seems, was made to Chase before Johnson contracted for the lot with Shepard, and not being in possession at the time it can with no propriety be considered as forming a part of the *res gestæ*. Such evidence was improperly admitted by the court, to show that the house and lot were purchased with money due to Mrs. Johnson. But it was admissible as evidence on the part of Mrs. Johnson to show that her son was indebted to her. The rule, in such cases, is this:—that where evidence is proposed which is admissible for one purpose, or against one party, it is proper to receive it, with directions to the jury as to the purpose for which it is received, or against what party it is to have influence.

As to the letter written by M. Y. Johnson, it was evidence against him, and perhaps, owing to the structure of the issues, which are not calculated to simplify this controversy, was proper evidence in the cause, subject to the rule just above stated. In the case of Hildreth vs. Sands, 2, J. C. R. 35, Chancellor Kent advanced the opinion that if a deed is fraudulent on the part of the grantor, it could not stand even if the grantee was innocent of the fraud. In the subsequent case, however, of Anderson & Roberts, 3 J. C. R. 378, he admits that that dictum was properly corrected when that cause was afterwards before the court of errors; 14 J. R. 498. So it has been held that a conveyance, even if for a valuable consideration, is not, under the statute of fraudulent conveyances, valid in point of law from that circumstance alone. It must also be *bona fide*. Judge Story says, cases have been repeatedly decided, in which persons have given a full and fair price for goods, and where the possession has been actually changed, yet being done for the purpose of defrauding creditors, the transaction has been held fraudulent, and therefore set aside; 1 Equity, § 369. The letter was written after the conveyance to Mrs. Johnson, and should not prejudice her rights. A grantor, by declarations subsequent to his conveyance cannot affect the rights of his grantee; 1 Mass. 165; 12 Mass. 429. The jury applying the facts in the case to the contents of the letter, would determine whether it was written with an intent to communicate

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information, or whether it was a mere romance ; and the circumstances that the relative was in existence, and did reside at the place to which the letter was addressed, would have their influence in this enquiry.

To the instructions which were given at the instance of the complainant, no exceptions were taken. But to the refusal of the court to give the two which were asked and refused, exceptions were filed. The first of these instructions turns upon the consideration of the defects, omissions and concealments of the answer. These matters were open to the commentary and observations of the court. The court might have made such remarks upon them, as in its discretion were thought proper for the guidance of the jury. If the court omit to do this, counsel are always at liberty to do it. The refusal of the court to do so, is not an error of law. Indeed it might be questioned how far a court would be warranted in giving that to the jury as a positive instruction, which can only be regarded as a comment on the evidence, intended to aid and assist the jury in their deliberations. Would not such an instruction usurp the province of the jury? *Van Ness vs. Packard*, 2 P. 158. If the answer omits to deny a fact charged in the bill, that is no admission of the fact. The plaintiff may object to the answer for insufficiency in this respect, as he may for insufficiency as to any other fact charged. But if he takes no exception and the cause goes to a hearing upon the general replication, it is a waiver of the exception, and the plaintiff must prove his case. 5 *Mason's Rep.* 270. In asserting this principle, however, it is not intended to be maintained, that a neglect to except to an answer on account of its insufficiency, would exempt it from strictures for its evasiveness, concealments or other defects which weaken its force when given in evidence to the jury. The second of these instructions asserted an undoubted rule in ascertaining the weight of answers in chancery. When the answer is contradicted in any one or more important particulars, by adequate evidence, it is deprived in all other respects of that weight which is allowed to answers by the rules of a court of equity ; for being falsified in one thing, no confidence can be placed in it as to others. *Roundtree vs. Gordon*, 8 *Mo. Rep.*, 2 *Tuck.* 503.

As to the instruction which were given at the instance of the defendants, their language is certainly open to criticism, and the law of them may be doubted. *Richmond vs. Richmond*, 10 *Yerger*, 343. There was no necessity for telling the jury they were bound to believe the answer of Hannah Johnson, unless it were proved that she swore falsely. If the answer had the weight attributed to it by the instructions, it might have been communicated to the jury in a way, so that

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they would not be driven to the painful alternative of saying a lady swore falsely or the answer is true. This may seem a small matter, but we all know that such things have their weight. That an answer responsive to a bill can only be overturned by two witnesses, or one witness and corroborating circumstances, is a principle coeval with our chancery system. But this principle is subject to many just qualifications, as that the answer itself may contain circumstances giving greater credit to the testimony of a single witness; so when the answer is contradicted in a material matter by adequate evidence, it is deprived in all other respects of that weight which is allowed answers by the rules of a court of equity. *Roundtree vs. Gordon*, 8 Mo. Rep. This principle with its many qualifications is entrusted to the learning, skill and experience of chancellors, to be applied by them in adjusting the controversies of suitors. What is the object of an issue in chancery? A chancellor looking at the pleadings and evidence in a cause, is at a loss to ascertain the truth of a fact according to those rules of evidence which the law has prescribed for his government. Under such circumstances, he takes the opinion of the jury on the subject, who apply no other rule to ascertain the weight of the evidence than that experience which governs their conduct in life. If the jury in trying the issue, be fettered by the rule that the answer must be contradicted by two witnesses, or one witness and corroborating circumstances, their verdict is no evidence of the real state of the fact involved in the issue; it is a mere declaration of their own opinion, shewing how the matter stands under the rule of evidence in chancery, in relation a defendant's answer. So in fact a chancellor in directing an issue, would be delegating his judicial functions to a jury. It is clear that an issue may be directed, when there is only a single witness against the answer. *De Tastel vs. Bordenave*, 4 Con. Eng. Chan. Rep. 244; 2 Bacon 582. A chancellor in directing an issue may determine the effect of an answer in evidence; it is not evidence for the defendant unless he orders it to be so. The plaintiff may read it as an admission; then it is sa any other admission under oath. The order directing an issue may require one or both of the parties to be examined; it may direct a fact to be admitted. As the issue is intended for his own information, the chancellor may have it tried in a manner most satisfactory to himself.* *Barker v. Ray*, 3 Eng. Con. Chan. 35. The character of the answer would influence a chancellor in directing an issue. If in his opinion, it is not entitled to the weight usually allowed answers, there is no hardship on the defendant in directing an issue. Chancellors usually look into causes, and see that there is a necessity for an issue

before it is directed. I would never direct an issue, when I was willing to say that the answer should have the weight of two witnesses, or of one witness and corroborating circumstances. When in the opinion of the chancellor, the answer is of a character that gives it that degree of weight, I should think it safer to apply the rule myself, than to leave it to inexperienced juries. How is a jury to ascertain what is, and what is not responsive to a bill? We find the judges themselves acknowledging the difficulty in laying down the rule on the subject distinctly and precisely, and running into "*niceties utterly unworthy a court of justice.*" 2 Tuck. Com. 502. The weight to be given to an answer must depend on the nature of the answer itself. Although an answer may be responsive to a bill, yet if it be inconsistent with itself, if the matters thereof are incredible, can it be that two witnesses are necessary to its overthrow? *Pierson v. Catlin*, 3 Ver. 272. If different witnesses testify to various circumstances impeaching the credit of an answer, would not that be sufficient to overthrow it? These observations show the danger of applying any fixed rule to all answers, and the impropriety of allowing parties, as a matter of course, in every case to try the facts in a chancery cause by a jury, when the answer is to have the weight of two witnesses. The directing of issues, is a matter of discretion in the chancellors, to be done when a difficulty in ascertaining the truth of a fact in a cause arises. It must be confessed that the provision in the statute directing that the allegations put in issue shall be disposed of by a general or special verdict, before a final decree shall be made, creates some embarrassment in the consideration of this subject. But let it be remembered that that provision was the adjunct of the 1st sec. of the article in which it is found. It did not exist before the enactment of that section, which was repealed at the session succeeding that at which it was enacted. Its retention was perhaps an oversight, and to the same cause we may be indebted for it in the present code. Be that as it may, we do not conceive that the provision of itself, was designed to overturn the entire ancient practice in chancery in relation to the trial of issues. The speedy retracing of our steps, and falling back on the old practice after an abortive effort to change it in 1835, shows the difficulties with which the subject is surrounded, and how wise it is to keep within the ancient landmarks.

The objection to the instructions given at the instance of the defendants, that they assumed that the answer was responsive to the bill can not be enquired into by this court, as the amended original bill is not copied into the record. But it is obvious that an answer, unless it is responsive to a bill, is not evidence when it has been replied to. We

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have seen that its contradictions may destroy its credit. So if a fact is asserted by a party, not of his own knowledge, although it may be responsive, it is not entitled to the weight of an assertion made on the personal knowledge of a party. 1 Dana. 474; 11 Wendall, 343; 9 Cr. 153.

Judge Tucker says there are cases in which the answer of a defendant is, in a court of equity, disarmed of all its force, or yields to the superior weight of even a single witness. Thus if the answer be evasive, it will not prevail where contradicted by one witness. Or if it be not positive and upon the knowledge of the defendant, the evidence of one positive and credible witness will overthrow it. 2 Tuck. Com. 502.

The fifth and sixth instructions, given at the instance of the defendants are also complained of. The object of these instructions, was to prevent the testimony of T. Polk, who drew the deed from the Johnsons to their mother, from affecting the rights of Mrs. Johnson. Polk's testimony related to what transpired at the time of the execution of the deed, to the declarations of the grantor made at that time. Such being the character of the testimony, it was beyond all question part of the *res gestæ*, and admissible; and it was competent to show the intent and inducements with which the deed was executed. Mrs. Johnson taking under that deed, must take it subject to the explanations to be furnished by the acts and declarations of the grantor at the time of its execution. Johnson's subsequent declarations could not affect his grantee. But his declarations made at the time of the execution of the deed, are a part of the *res gestæ*, and show the motives which influenced his conduct at the time. Bridge v. Eggleton, 14 Mass. Rep. 245. His conduct on the occasion tended to show that the deed was voluntary, and without any consideration, and if it were such, he being at the time insolvent, it was fraudulent, and void against his creditors. It is a matter of indifference whether the grantee were cognizant of the indebtedness or not, or whether she accepted it in good faith. If it were a fact that the deed was without a valuable consideration, or if it were merely for love and affection, the Johnsons being insolvent, it was fraudulent and void against creditors, however innocent and spotless the grantee might have been, for a man must be just, before he is generous. The declarations of Johnson made at the time of the execution of the conveyance, tended to show that it was a voluntary one, and those who take it under that conveyance, must take it subject to the infirmity attached to it by the conduct of the grantor.

The other judges concurring in reversing the decree, it will be reversed and the cause remanded.

Amis vs. Steamboat Louisa.

AMIS vs. STEAMBOAT LOUISA.

This was an action brought under the acts concerning boats and vessels, for work and labor done on two keel-boats, charged to have been appurtenances of the steamboat Louisa. Held:

1. That, what is an appurtenance of a steamboat, is a question of fact to be determined by the jury.
2. That evidence showing that the keel-boats were repaired for the use of the steamboat Louisa, and were used to assist that boat in navigating the river, although not originally constructed for the Louisa, was evidence to show that they were appurtenances of that boat.

APPEAL from St. Louis Court of Common Pleas.

LEONARD AND BAY, for Appellant.

POINTS AND AUTHORITIES.

1st. The court below erred in instructing the jury, that they were bound, on the evidence before them, to find for the defendant. This instruction virtually took the whole case from the jury. *Chamberlin vs. Smith's admr.*; 1 Mo. Rep. page 341, 2nd ed.; *Labeaume vs. Dodier, et al.*; 1 Mo. Rep., 441, 2nd ed.; *Hughes vs. Ellison*, 5 Mo. Rep. 111; *Morton vs. Reed*, 6th Mo. Rep. 73; *Glasgow and Harrison vs. Copeland*, 8 Mo. Rep. p. 268.

2nd. The evidence clearly established the truth of the allegation, that the barges were appurtenant to the steamboat, and the statute renders the boat liable for labor done by mechanics and others, in "*fitting out, furnishing and equipping*" the boat. The barges were certainly considered as necessary appendages to the steamboat, in order to enable her to accomplish the object of her owners, in transporting freight from St. Louis to New Orleans.

Revised Statutes of 1835, act concerning "boats and vessels," page 102, sec. 1; act of Feb. 12th, 1839, concerning "boats and vessels;" session acts of 1838-9, page 13. The execution of the note by the clerk by order of the captain, was an admission of the justice of the claim, as well as the amount of the demand. *Byrne vs. St. Bt. Elk*, 6 Mo. Rep. page 555.

A. HAMILTON, for Appellee.

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POINTS AND AUTHORITIES.

1st. This court will not reverse, because of an erroneous instruction, if the party complaining has shown no right of action; 6 Mo. Rep. 280. Nor if it is apparent from the record, that the instructions given could not have been prejudicial to him; 7 Mo. Rep. 417; 8 ib. 225. The instruction of the court, was in effect, a demurrer to the plaintiff's evidence. The defendant introduced no testimony.

2nd. The execution of the note by the clerk, under the direction of the master, cannot *per se* operate to impose a lien, if none legally exist. The master, it is true, is authorized to bind the boat, but the scope of his authority is declared in the act. This transaction was not within his powers. R. L. 1835, p. 102, sec. 1. He could only have given a note, in the names of the barges.

3rd. That the barges were owned by the proprietors of the Louisa, and were in the occasional use of that boat, as lighters in carrying freight, did not make them, in legal contemplation, like a yawl for instance, parts of her necessary furniture and equipment. They were separate and distinct existences—were not built with reference to the Louisa, but for another purpose, were distinguished by names, and were susceptible of registration. Another steamboat, used in the same way, as a lighter, might with equal propriety be considered an appurtenance and part of the principal boat.

4th. The testimony did not show that the barges were appurtenances, or parts and parcels of the Louisa, but established directly the contrary, and that they were only in the occasional or temporary use of the boat, as lighters.

McBRIDE, J., delivered the opinion of the court.

This was a proceeding under the Statute, R. C. 1835, p. 102, and the supplemental act of 1839; Sess. acts 1838-9, p. 13. To the original complaint filed in the cause, the defendant demurred, assigning as special causes, that it appeared by the complaint that the sum claimed by the plaintiff accrued on account of work done, in the caulking and repairing of two *keel-boats*, used in navigating the waters of this State, and not for work done on the said steamboat Louisa; and that it was not alleged, and did not appear, that the keel-boats belonged to, and were appurtenances of the said steamboat Louisa. The court of common pleas sustained the demurrer, and the plaintiff asked and obtained leave to file an amended complaint. The amended complaint stated

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the cause of action to be for work and labor on certain *barges*, connected with and appurtenant to the said steamboat Louisa.

To the amended complaint the defendant pleaded, 1st *nil debit*. 2d, That the said plaintiff did not perform work, &c., on the said steamboat Louisa, or any part or parcel thereof. 3d, That the said keel-boats or barges, at the time the work was done, were not, nor was either of them, appurtenances of the said steamboat Louisa, as stated in said complaint.

On the trial, the plaintiff offered evidence conducing to prove the work done on the barges and its value, and that the clerk of the said steamboat gave a note in the name of said boat, by order of the captain, for the work, as stated in the complaint—that these barges were originally built by the dry dock company for another purpose, and were subsequently bought by the owners, and repaired for the use of the steamboat Louisa. That they had distinct names, the one called the “Wave,” and the other the “Ripple;” and their capacity was about 125 tons each. That it was customary to register such barges—those had been used by the steamboat Louisa on several occasions, in carrying freight on the Mississippi river, and that the freight bills were given in the name of the Louisa *and* barges. That barges are used by steamboats in times of low water. Some boats have no barges. That a yawl is an essential part of the appurtenances of a steamboat, but that a barge is not. Some boats have no yawl. That barges, when used, are as much under the care and control of the officers, as the boat itself.

The defendant offered no evidence. Thereupon the court instructed the jury, that from the evidence before them, they were bound by law to find for the defendant, and the jury having so found, the court entered judgment, when the plaintiff filed his motion for a new trial, assigning, among other reasons, because the court misdirected the jury, which being overruled, he appealed.

The instruction of the court is the error complained of. What is or is not “appurtenances” of a steamboat, is, we think, a question of fact, to be established by evidence, and the fit subject of enquiry for a jury. The statute no where defines what is meant by the term; it must then be referred to the intention of the defendant, and the general understanding of the community who are conversant with the business of steamboating. It does not necessarily follow, that because the keel-boats were originally built for another and an entire different purpose, that they may not afterwards become so identified with the steamboat, as to be said to be appurtenant thereto. So of a yawl, which may have originally been built for a pleasure or market craft, or used by the dry

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dock company, to facilitate their business, and is afterwards purchased by a steamboat for the purpose of accompanying and being used by her in navigating the rivers. And the same may be said of all the tackle of a steamboat, none of which was originally made for the boat which acquired it. We are of opinion, moreover, that there was some evidence conducing to show, that the keel-boats repaired at the instance of the captain of the steamboat, and used in the employment of the boat, when occasion required their use, come within the term "appurtenances" of said steamboat. This then being the tendency of the evidence to establish a fact relevant to the issue before the jury, the court erred in the instruction given, which took the whole case from the jury. 1 Mo. R. 483; Ib. 619; 5 Ib. 110; 6 Ib. 73; 8 Ib. 268.

The other judges concurring herein, the judgment of the court of common pleas is reversed, and the cause remanded for a new trial to be had in that court.

FINNEY, DOBYNS & SHADE vs. THE STATE OF MISSOURI, USE OF, &c.

1. This was an action of debt upon the bond of an administrator, against the securities. The declaration alleged the receipt of money by the administrator—that after its receipt he had died—and the breach assigned that the administrator did not, nor would faithfully account for and pay and deliver the said sum of money according to law. And that since the death of said administrator, his legal representatives, or any of them, have not paid the said sum of money." This is a sufficient assignment of a breach, and it need not be averred that the deceased had, or had not, an administrator or executor.
2. The jury found that the administrator had failed to account and pay, but omitted to say anything as to any payment since his death. This was only an imperfect finding, and can only be taken advantage of by motion in arrest.

APPEAL from St. Louis Circuit Court.

GAMBLE & BATES for Appellants.

POINTS AND AUTHORITIES.

1st. On the demurrer.

The plaintiff's declaration leaves the money in the hands of O'Neil until his death, and shows no person in existence who was permitted

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by law to pay it to his successor, or to meddle with it. No administration appears to have been taken on the estate of O'Neil. There was then, no breach of the condition of the bond. This case is not like the case of Darland vs. Cotton, et. al., 9 Mo. R. *There*, there *was* a person in being, who was bound to pay the money to the succeeding administrator; *here*, there was none.

2d. The inquiry by the jury was wrong.

By statute (R. C. p. 431, § 7,) the truth of the breach is to be found.

An inquiry of this sort, must be into the truths of the whole breach, so far as it is material to the recovery, and must respond to it as a verdict does to an issue. And a verdict finding *part* of an issue, and leaving a material part undecided, is bad. The jury must find at least the substance of every issue submitted to them.

CALLAHAN for Appellee.

POINTS AND AUTHORITIES.

I. The appellee contends that the court below did not err in overruling the demurrer. Because,

1st. It was not necessary to aver that there had been an order of the probate court for the payment of the money sought to be recovered in this action. The State, use of Darland, &c. vs. Porter, Kay & Cotton, 9 Mo. R.

2d. It was enough to assign the breach in the words of the condition of the bond; and the omission of the allegation that O'Neil's executor or administrator had not paid the aforesaid money, was not material. 3 Saunders, 411, n. 4, Arlington vs. Merrick; 2 Hen. & Mun. 446 & 459; 6 Wend. 454; 1 Bos. & Pull. 460; 1st Wend. 518, Pevey vs. Sleight. But,

3d. There is, substantially, such allegation in the declaration, the words, "his legal representatives," as therein used, implying and comprehending his executor or administrator, (if he had such, for the record does not show that he had.) 2 Saunders, 61, g. note 9; 1 Saunders, 235, a. note 8, last paragraph; 5 Mo. Rep. 147 (164) Wear & Hickman vs. Bryant; Rev. Stat. 1835, 394, "Limitations," art. 2, sec. 6; art. 3, secs. 4 & 5, page 44; "Administration," art. 1, sec. 34.

4th. The declaration throughout is sufficient on general demurrer. Rev. Stat. 1835, 430, "Penal Bonds," s. 1; 9 Mo. Rep. 218, Leetle vs.

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Mercer; Rev. Stat. 1835, 458, "Practice at Law," art. 3, sec. 14; new Rev. Stat. 811, "Practice at Law," art. 3, sec. 16.

II. As to the error thirdly assigned, nothing can be successfully or properly urged here against the action of the jury in the circuit court. Because,

1st. No exception was thereto taken in the circuit court, and the supreme court will not entertain any objection in that behalf, which was not raised in the court below. 4 Mo. Rep. 446, Davidson vs. Peek; 7 Mo. Rep. 215, Fresh vs. Million, decided at the last July term of this court 6 Mo. Rep. 50, Griffin & Kinote vs. J. & C. Samuel; 8 Mo. Rep. 59, Cornelius vs. Grant. But,

2d. There is not any thing that appears to be exceptionable in the inquiry, or the manner thereof; certainly nothing which the court here may not supply or amend. Rev. Stat. 1835, 468 & 469, "Practice at Law," art. 3, secs. 6, 7 & 8; new Rev. Stat. 827 & 828, "Practice at Law," art. 3, secs. 6, 7 & 8.

III. The appellants having withdrawn (as it is understood) all objection to the subject matter of their fourth assignment of error, the appellee, of course, need say nothing in relation thereto.

SCOTT, J., delivered the opinion of the court.

This was an action of debt on an administration bond executed by Hugh O'Neil, as administrator of the estate of Michael Reilly, deceased, with the appellee Finney and others as his securities. Phillip McGowen was joint administrator with Hugh O'Neil. McGowen died, and after him O'Neil. The suit was against the securities of O'Neil. The declaration alleges that McGowen died, and that after his death, O'Neil, the surviving administrator became possessed of \$2,877 13, belonging to the estate of Michael Reilly, deceased. It is further alleged, that after O'Neil became possessed of said sum of money, and before payment and delivery thereof according to law, the said O'Neil died, and Peter A. Walsh, as public administrator, took charge of the estate. The breach assigned is, that neither the said McGowen nor O'Neil, during their joint lives paid, nor the said O'Neil after the death of said McGowen, would or did faithfully account for, pay and deliver the said sum of money according to law, and that since the death of said O'Neil, his legal representatives, or any of them have not paid or delivered to Peter A. Walsh, the successor of O'Neil, the said sum of money, or any part thereof.

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The defendants below prayed oyer of the bond, which being granted, they demurred to the declaration. The demurrer was overruled. A jury was then sworn to try the truth of the breach of the condition of the bond, alledged in the declaration, and to assess the damages arising thereon.

The jury by their verdict find that neither McGowen nor O'Neil, in their lifetime, nor O'Neil after the death of McGowen, did pay over the money, but omit saying anything in relation to the non-payment after the death of O'Neil, by his representatives.

The overruling the plaintiff's demurrer, and the defective finding in relation to the truth of the breach of the condition of the bond set out in the declaration, are the errors complained of by the appellants, defendants below.

It is urged for the appellants, that the declaration shows the money in the hands of O'Neil at the time of his death, but that there was no person shown to be in existence, who could by law pay it to his successor.

This is a suit, not against O'Neil nor his representatives. It is against his sureties. The breach of the condition alledged is, that O'Neil did not pay the money, nor has it been paid since his death. When O'Neil died there ceased to be any representative of Michael Reilly's estate the representative of O'Neil, as such, would have had no control over any trust fund, which had been committed to the care of O'Neil. Such fund would have belonged to the estate of Reilly. If this fund did not exist, the conversion of it by O'Neil, constituted a demand against his estate, which could have been obtained, only like any other demand. This being a suit against O'Neil's sureties, on a bond conditioned that O'Neil would account for money, and it appearing that the money was not paid by him during his life, and that it has not been paid since, on what principle is a suitor compelled to go further, and aver that there was an administrator of O'Neil, and that he had not paid it. Suppose there had been no administration on O'Neil's estate, or he had gone abroad and died, leaving no effects here; how could there have been an administration? Had there been an administration on O'Neil's estate, the probate court would have had no authority to make an order on O'Neil's administrator as such, relative to Reilly's estate; there would have been no privity between them. Had the money existed, and could it have been identified as the trust fund, M. Reilly's admr. might have compelled its delivery, or if it had been made way with, it would have been a demand against O'Neil's estate.

In accordance with the previous decisions of this court, the detec-

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tive finding of the jury could only be taken advantage of, by motion in arrest. Where a material issue is entirely overlooked by the jury, and the finding is not a general one, the want of such finding in a material issue, may be taken advantage of on writ of error, though no motion in arrest be made in the inferior court. *Jones & Jones vs. Snedcor*, 3rd Mo. Rep. 390; *Pratt vs. Rogers*, 5 Mo. Rep. 53. But when the finding is a general one, it will raise a presumption that all the issues have been duly considered by the jury, (*Stout vs. Calver*, 6 Mo. Rep. 256;) and where the finding is merely defective or imperfect, the judgment will not be reversed, unless a motion has been made in the inferior court to arrest the judgment, and overruled. *Davidson vs. Peck*, 4 Mo. Rep. 445. In the present case there was but one breach before the jury, and their verdict upon that breach, did not embrace all the matters which they should have found to authorize their conclusion in favor of the plaintiff; but inasmuch as the attention of the circuit court was not directed to the defect, where it would have been readily corrected, no advantage can be taken of it here.

Judgment affirmed.

STEVENS, GARNISHEE, &C. VS. GWATHMEY, ET AL.

1. The answer of a garnishee may be disproved by evidence of his declarations made prior to the making his answer.
2. Where the answer of a garnishee denies his indebtedness to the defendant, if the answer be found untrue, the garnishee is liable for interest upon his indebtedness. But where a garnishee admits his indebtedness, and avows his readiness to pay whenever it shall be determined by the court to whom he is liable, he is not bound to pay interest.

ERROR to St. Louis Circuit Court.

DRAKE, for Plaintiff in error.

POINTS AND AUTHORITIES.

1. The answer of the garnishee is evidence in his favor, and is to be taken to be true until disproved. *Davis vs. Knapp & Shea*, 8 Mo. Rep. 657.
2. Like an answer in chancery, that of a garnishee must be disproved by the testimony of two witnesses, or one witness and circum-

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stances equivalent to the testimony of another. 2 Story's Eq., 734-44. The witnesses in such case should testify to facts within their own knowledge tending to disprove the answer, apart from the garnishee's statements.

3. Statements made by the garnishee in conversation, variant from his answer, though proven by any number of witnesses, amount to nothing more at last than opposing him to himself; with the advantage in his favor that his answer is under oath.

4. The evidence of the garnishee's conversations should be received with *great caution*. Greenleaf's Ev. 233.

5. The conversations were held nearly a year before the making of the answer, at a distance from the garnishee's residence, and without his books and papers to refer to. Under such circumstances he may well have been mistaken, and have supposed himself indebted to the defendant; and yet, when the necessity of stating the facts *on oath* arose, and he investigated the matter fully, with the aid of his books and papers, he may find that his conversations were utterly wrong.

6. The admission of such evidence to disprove the garnishee's oath, operates a complete and most injurious surprise upon him. He is required to state in his answer *facts*, not whether he had said particular things; and when confronted with evidence of his conversations, to disprove the facts stated, he must of necessity be taken by surprise; and he is debarred the opportunity, which he might otherwise be enabled to embrace successfully of shewing by other testimony that the conversation was essentially different from that represented by the plaintiff's witnesses, or of impeaching their credibility.

7. The garnishee stands in the position of a witness as well as a party, and is entitled to the benefit of that rule of law, that before a witness can be contradicted by evidence of statements made by him contrary to his evidence, he shall be questioned as to the statements alledged to have been made by him, and time, place, and circumstances specified, so that he may recollect and explain what he had formerly said. Greenleaf Ev. 514-15-16; Able & Isbell vs. Shields, 7 Mo. R. 120,

8. The law will not presume in any case that a man has sworn falsely; but where he is shown to have made statements in conversation different from those made under oath, it presumes that if permitted he could satisfactorily explain the conversation. In this case opportunity for explanation was utterly denied to the garnishee.

9. The cases of Greer vs. Mullikin, 5 Mo. R. 493, and of Martin vs. Barr, 5 Mo. R. 102, are held to be in point here. In those cases the

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effort was made to give evidence against parties, of statements made by them under oath as witnesses, and this court decided that it could not be done.

10. The conversations of the garnishee indicated manifest ignorance of his rights, in the supposition, that because the defendant had advanced money on account of the partnership, he was, *therefore*, indebted to the defendant; a supposition not sustained by any legal principle.

11. A conviction of perjury cannot be had upon evidence merely of the conversations of the witness, different from his oath; because the evidence falls short of proving the oath false. If insufficient in that case, the same kind of evidence should be insufficient in this. *Roscoe's Crim. Ev.* 687.

12. To the benefit of all these objections the garnishee is peculiarly entitled, because he is not interested in the result of the case; it being immaterial to him, whether he pays the amount of his indebtedness to the defendant, or to the plaintiff in attachment.

13. But if all other points in the case are decided against the garnishee, it is still unquestionably true, because stated in the answer and not denied, but, on the contrary, sustained by the plaintiff's evidence, that whatever indebtedness may have existed, was on an unsettled partnership account. For any such claim the defendant could have no action against the garnishee, and unless the defendant had a cause of action against the garnishee, the latter could not be held. *Story on Part.* 322; *Collyer on Part.* 143; *Gow. on Part.* 87; *Main F. & M. Ins. Co. vs. Weeks*, 7 Mass. 438.

14. A garnishee cannot be charged with interest on an indebtedness to the defendant, which may be found against him. *Willings vs. Consequa*, 1 Peters' C. C. R. 301; *Norris vs. Hall*, 18 Maine R. 332.

McBRIDE, J., delivered the opinion of the court.

Gwathmey, Forbes and company, brought their action against F. C. Steinback, in the St. Louis circuit court, and garnisheed Robert Stevens as the debtor of said Steinback. On the 6th May, 1844 Stevens filed his answer to the interrogatories propounded to him, denying his indebtedness except for a small amount, and on the 10th of the same month the plaintiff's filed their traverse to the answer. On the 14th March, 1845, neither party requiring a jury, the cause was submitted to the court, when the court found the answer to be untrue, and assessed the damages of the plaintiffs to the sum of \$1,523 45, and

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entered judgment against Stevens for the same. A motion was made to set aside the verdict for the following reasons:

1. Because the verdict is against law.
2. Because the verdict is against evidence.
3. Because the verdict cannot, by the law of the land, be rendered against a man for an unsettled and unliquidated balance of a partnership account, which the indebtedness of the garnishee herein, if any existed, was shown to be.
4. Because the verdict is against the weight of evidence.
5. Because the court erred in refusing to decide the four first points of law, in favor of the garnishee, which were prayed by him.

The motion being overruled the defendant excepted, and has brought the cause to this court by writ of error.

The bill of exceptions shows that on the trial the defendant prayed the court to decide the following points of law for him.

1. That the answer of garnishee must be taken to be true until disproved, and it cannot be disproved by evidence of the garnishee's admissions, made in conversation before the making of the answer, unless such admissions be connected with proof *aliunde*, of indebtedness to the defendant.

2. That the oath of the garnishee cannot be proven to be false, by evidence of admissions made by him in conversation before the answer was sworn to.

3. Where a party's conversations are given in evidence to disprove his oath, without other evidence to corroborate the truth of the conversations, the jury must presume the oath to be true.

4. That no interest can be allowed against the garnishee on any sum in which he may be found indebted to the defendant.

5. If the jury believe from the evidence that the alleged indebtedness of the garnishee to the defendant, was on account of a partnership existing between the garnishee and defendant, the affairs of which are yet unsettled, and that such indebtedness has not been ascertained upon a settlement of the affairs of the co-partnership, and liquidated between the partners, the plaintiff cannot recover against the garnishee.

The court decided the fifth point for the garnishee, but refused so to decide the first four, to which refusal the garnishee excepted.

We have not thought it necessary to set out the answer of Stevens, and the exhibits filed therewith, nor the evidence introduced by the plaintiffs on the trial, as there was an admitted conflict between the testimony and the answer; this court having so frequently held, that where this is the case, the finding of the jury will not be interrupted.

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The questions presented for the decision of this court, arise on the refusal of the circuit court to decide for the garnishee the first four points of law asked for by him.

Are the admissions of indebtedness made by the garnishee, prior to the making of his answer, admissible in evidence, unconnected with proof *aliunde* of indebtedness to the defendant in the action? As a negative to this question, we are referred to the case of Davis vs. Knapp & Shea, 8 Mo. R. 657, which was a similar proceeding to the one now under consideration. Davis had been garnisheed for a debt due from Fleming to Knapp & Shea, upon the supposition that he was indebted to Fleming; Davis answered denying his indebtedness except for seventy-five cents; the plaintiff traversed his answer, and on the trial offered evidence to prove that Davis had admitted his indebtedness to Fleming. The judge in delivering the opinion, remarks: "But the answer of the defendant, plain common sense would say, is to be presumed true, until the plaintiff proves it to be untrue, that is to say, until they proved that Davis owes Fleming more than seventy-five cents." And afterwards in the same opinion, the judge says: "In the first place the answer of Davis is to be taken as true, until the contrary is proved; and although the first witness of the plaintiff, by his evidence, rather impeached the truth of the answer, yet if the fourth instruction had been given, the jury might have given more credit to the answer than to the testimony of this witness. The testimony of the second witness of the plaintiff is in no way inconsistent with the answer of Davis. He states that Davis said he paid Fleming every Saturday, &c."

Whilst the case above cited states the law to be, that the answer of the garnishee must be taken to be true until disproved, it at the same time shows that in that case at least the court thought it competent to disprove the answer, by proving that the garnishee had admitted himself indebted to Fleming, the defendant. We have not been referred to any other adjudged case on this point, and we presume none can be found which qualifies the general doctrine to the extent contended for by the counsel for the garnishee.

The general rule is that the declarations of a party to the record, or of one identified in interest with him, are as against such party, admissible in evidence; and we see no sufficient reason why the admissions of a garnishee should be exempted from its operation, whether made before or after he swore to his answer. If his admissions are received as evidence against him, because of the probability of their truth, it would seem that those made before his answer was sworn to should be

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preferred, as least subject to the imputation of having been made to deceive, or for the purpose of sustaining the statements made in the answer. Experience teaches that men are not prone to make admissions against their own interest; fanatics and madmen may, whilst rational men do so very rarely. It does not unfrequently happen that actions at law are based upon the admissions of parties, that they are indebted to a third person; shall it be said that such admissions are to receive no credence, and that after a suit has been superinduced thereby, the party making them shall not be held liable therefor?

The principle of law is the same in criminal cases, and it is the every day practice to convict individuals for the most heinous offences upon their own confessions, whether made before or after their arrest. But it is contended that the answer is made under the solemnity of an oath, and is therefore to be taken as true in preference to the admissions of the party not under oath. How far this is so, would form a legitimate enquiry for the consideration of the jury.

We have been referred to two cases in the 5 Mo. R. 103, 493, as having some bearing on the subject of admissions. These cases only go the extent of deciding that it is not competent to prove what a party stated under oath; for the reason perhaps that he may be called again as a witness in the cause, and is most competent to detail his own evidence; or his evidence may have been given under a misapprehension of his rights, or the facts as since ascertained. No such proof was offered in this case.

It is certainly true that a party cannot impeach the testimony of his own witness, even when the witness is a party to the suit, as in proceedings before a justice of the peace, where the plaintiff may call upon the defendant to testify as to the correctness of his demand; or where a party by a bill of discovery calls upon his adversary to disclose certain facts. The statute under which this proceeding was had, does not regard the garnishee as a witness for the plaintiff, but expressly provides that "the plaintiff may deny the answer of the garnishee, in whole or in part, and the issues shall be tried as ordinary issues between plaintiff's and defendants." The answer may more properly be assimilated to an answer in chancery, and when read it becomes evidence for the defendant, and is conclusive if not disapproved by the plaintiff. How disproved? Either by evidence *aliunde*, or by the admissions of the defendant himself.

Whether the indebtedness of the garnishee Stevens, to the defendant Steinback, was on an unsettled partnership account between them, was referred by the fifth instruction to the jury; and if so found by the

Stevens, Garnishee, &c. vs. Gwathmey, et al.

jury, they were told that the plaintiffs could not recover. This being a question of fact it was properly referred to the jury, and they have found it against the garnishee.

The remaining question is the right of the plaintiffs to recover interest from the garnishee.

The act regulating interest on money, R. C. 333, provides that creditors shall be allowed to receive interest at the rate of six per cent. per annum, when no other rate of interest is agreed upon, for all monies after they become due by any instrument of the debtor, in writing, &c., on money due, and withheld by an unreasonable and vexatious delay of payment, or settlement of accounts, &c.

In Virginia it has been decided that the defendant, where a debt is attached in his hands, and the attachment is afterwards discharged, cannot protect himself from the payment of interest while the order remains in force, if he retain the money in his hands. 1 Wash. 145. He ought, (in order to have absolved himself from interest,) to have brought the money into court to abide its order—and the court would have directed it to be put out at interest *pendente lite*, so as to avoid loss to the parties. 4 H. & M. 265.

In the case of Norris vs. Hall, 18 Maine R. 336, the court say, "Another objection interposed, relates to the amount of interest with which the defendant was charged. When he was summoned as trustee, he was legally chargeable with an accruing interest. The conclusion must be, that if he had the money then unemployed, he would then have satisfied those undisputed demands. And the fact that he did not pay it over when it was demanded, after he had been adjudged trustee, shews that he could not have procured it, and held it unemployed, to await the decision of the law. The facts sufficiently rebut such a presumption, and prove the defendant to have been in fault whenever a call for payment was made upon him; and he was properly charged with interest on the amount due."

If it be endeavored to raise a presumption in this case, that Stevens has had the money lying idle by him, to pay his indebtedness to Steinback, that presumption is fully rebutted by the fact that he denied the existence of such indebtedness. If Steinback had sued, no doubt can exist of his right to recover interest, under the facts found by the court; there is then no reason why Stevens should not pay interest to the plaintiffs. In adjudging him liable to the plaintiffs for interest, no particular hardship is imposed upon him, which he would not have been subjected to, at the suit of Steinback. Although the plaintiffs recover

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Steamboat Osprey vs. Jenkins.

interest of Stevens, it inures to the benefit of Steinback, and thus in effect it becomes a recovery in favor of Steinback vs. Stevens.

There are cases in which the garnishee ought not, in strict justice, to be held liable for interest; as where he comes forward, admits his indebtedness, and avows a readiness to pay the amount thereof, whenever the court shall determine who is entitled to receive it.

From the foregoing view of the case, we think the court committed no error; and the other judges concurring herein, the judgment of the circuit court is affirmed.

STEAMBOAT OSPREY vs. UPTON JENKINS.

1. The affidavit of the complainant in an action against a boat, stating "that the facts set forth in the complaint are true to the best of his knowledge," is sufficient.
2. When in a suit instituted by a non-resident, he having failed to give security for costs, if a motion be made to dismiss for want of such security, within the time allowed the defendant to plead, a judgment by default cannot be entered against the defendant until that motion is disposed of.

APPEAL from St. Louis Circuit Court.

CROCKETT & BRIGGS, for Appellant.

POINTS AND AUTHORITIES.

1. That the affidavit annexed to the complaint is insufficient. He swears only to the "*best of his knowledge*;" whereas it should have stated the complaint to be absolutely true; 6 Mo. R. 357-8; Chitty on Bills, 348.

2. That before the time for pleading expired, the plaintiff in error moved to dismiss the suit for want of security for costs, and whilst this motion was pending and undecided, judgment by default could not be properly entered. The defendant in the court below was not in default having appeared to the action in moving for security for costs; but was not bound to plead until the plaintiff had placed himself, *rectus in curia*, by giving the bond required by law, which has not yet been done.

3. That the default should have been set aside upon the affidavits filed.

GOODE & CORNICK, for Appellee.

Steamboat Osprey vs. Jenkins.

POINTS AND AUTHORITIES.

1. Relative to the 1st, 2d and 4th assignments of error, the uniform practice of this court has been "not to disturb a discretionary act of the court below, unless the record discloses a case of great hardship." According to the record it would have been a great hardship had the court acted otherwise than it did.

2. There is no law, statute, custom, or rule of court, by which the third assignment of error is sustained,

3. The affidavit is sustained by the decision of Bridgford et. al. vs. steamboat Elk, 6 Mo. R. 356.

4. The plaintiff in error is not entitled to be heard. There should have been an order of the court below obtained, permitting the defence to be conducted by the master, owner, agent, or consignee of the steamboat; See Dig. 1835, p. 103, § 7.

McBRIDE, J., delivered the opinion of the court.

Jenkins, on the 18th April, 1844, filed his complaint in the office of the clerk of the circuit court of St. Louis county against the steamboat Osprey, navigating the waters of this State, for damages sustained in the shipment of 130 barrels of apples from Cincinnati, Ohio, to Galena, Illinois. Jenkins verified the facts alleged in the complaint by the following affidavit:

"Upton Jenkins being duly sworn, states that the facts in the foregoing declaration are true, to the best of his knowledge, and that said cause of action has accrued within six months." Signed, &c.

A warrant issued on the same day returnable to the 3d Monday in November, being the 18th of the month. On the 23d November, 1844, the attorney for the boat filed a motion to compel the plaintiff, who was a non-resident, to give security for the costs; R. C. 1835, p. 127, § 8. On the 25th of said month, and before the disposition of the motion which had been filed two days preceding, the court entered a judgment by default against the defendant for want of a plea, and ordered an enquiry of damages. On the 4th December, the defendant filed a motion to set aside the judgment by default. On the 6th December the motion for security for costs was heard and sustained; and an order made requiring the plaintiff to give the security on or before the 9th of said month, when the plaintiff forthwith gave the security required. On the 9th December another motion was filed by the boat to set the judgment aside, and for leave to plead the merits of the action, which was

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overruled. An assessment of damages was made on the same day and judgment, whereupon the defendant excepted, and appealed to this court.

The errors assigned, and which we shall notice, are :

1. That the affidavit was insufficient upon which the warrant issued.
2. That the court erred in rendering a judgment by default against the defendant, before a disposition was made of the motion for security for costs.

To sustain the first point we are referred to a decision of this court, 6 Mo. R. 357, as an authority decisive of the question. The affidavit in that case was made by an individual not a party to the suit, and who from anything which appeared in the cause may have known nothing of the facts set out in the complaint, and consequently had no right to testify on the subject. Here, however, the affiant is the plaintiff, and should be presumed to know what he is testifying about, and whether the facts set out in the complaint are true. The reason, therefore, of the principle announced in the case referred to, has no application in the case now before us. But it is said that the plaintiff only swears to the best of his knowledge. This we think sufficient, particularly when the whole of the fact about which he deposes are presumed to be within his own knowledge; if he had sworn to the best knowledge of another, the affidavit would undoubtedly have been bad.

On the second point the record shows that within the time allowed by law for pleading, the defendant filed his motion, asking the court to make a rule against the plaintiff that he give security for costs, which the statute required him to do before he was entitled to become a suitor in our courts. The legitimate effect of this motion was to suspend all further proceedings until it was disposed of by the court; and we think the court erred in entering a judgment by default, for the want of plea, until the security for costs was given. There can be no propriety in requiring the defendant to incur any additional trouble and costs, until it was ascertained whether the plaintiff would secure him in the costs that had or might accrue in the event of his becoming liable for them. Besides the officers of the court, and others who are bound by law to render services in the cause, have a right to be secured in their fees for such services.

The plaintiff, however, invokes the aid of the 29th rule of the circuit court of St. Louis county, which provides that affidavits filed in support of motions, shall not be amended after they are filed, &c. This is no doubt a very salutary rule, and tends to prevent the making of affidavits "to order."

Anderson vs. Brown (of color.)

Notwithstanding the defendant did file an affidavit in support of his motion, stating that he had a meritorious defence to the plaintiff's cause of action, and which may have been rightfully adjudged insufficient, yet, inasmuch as he was not bound to plead until a disposition of his motion, there was no necessity for any such affidavit; and whether defective or not, it is not important now to enquire. There having been no *laches* on the part of the defendant, the rule is inapplicable.

The judgment of the circuit court will be reversed, and the cause remanded to that court, where the defendant will be permitted to plead.

The other Judges concurring herein, the judgment is reversed.

ANDERSON vs. BROWN, (OF COLOR.)

1. The act regulating suits for freedom, which authorizes the judge to issue a writ requiring the sheriff to bring the plaintiff before him, whenever he is satisfied that there is danger that the slave will be removed out of the State, does not require that the judge should be satisfied by the testimony of a witness; any evidence which satisfies him, or his own knowledge, is insufficient.
2. The proceedings on such a writ are not a part of the proceedings in the suit for freedom.
3. A party who is in court for one purpose, is not necessarily in court for any other purpose.
4. Judgment cannot be legally rendered against a party who has no notice of the proceeding.

APPEAL from St. Louis Circuit Court.

A. Todd, for Appellant.

POINTS AND AUTHORITIES.

1. The said writ was illegally issued, because issued on hearsay alone. The recital in the writ shows that it was issued on Dayton's affidavit, and the matter of the affidavit which is the basis of the writ, is only the information to Dayton by Paulding; 10 Wend. 420; 11 J. R. 175.
2. The judgment as against Anderson at least was illegal, because Anderson was not summoned under said writ, nor had any day in court, or other opportunity to defend or purge himself, and by the recital in the judgment, it appears that the court had no other evidence than said affidavit.

Anderson vs. Brown (of color.)

A judgment against a person not brought into court, is illegal and error; 7 Mo. Rep. 433; Oliver Caldwell vs. Rachael Lockridge, adm'x of Jones Lockridge, deceased, 9th Mo. Rep.

3. If the court below thought Anderson guilty of any willful disobedience of any process or order, lawfully issued or made by it, as provided for by sec. 37 of the act to establish courts of record, &c., page 160 of the Rev. Code of 1835. then by sec. 59 of said act, Anderson was entitled to a notice of the accusation and reasonable time to make defence.

4. Sec. 4 of the act for suing for freedom, p. 285, Rev. C. of 1835, does not authorize judgment against the person having the negro, and summoned. But if inferred, still Anderson was not summoned.

McBRIDE, J., delivered the opinion of the court.

On the 19th January, 1844, B. B. Dayton makes affidavit setting forth that on the 17th January, 1844, Squire Brown commenced suit, by consent, against Charles R. Anderson for his freedom in the St. Louis circuit court, and that an order was made by said court permitting said Brown to sue as a poor person, and that said Dayton be assigned as his counsel; that said Brown have reasonable liberty to see his counsel and attend the court, and that he be not removed out of the jurisdiction of said court, nor be subjected to any severity on account of his suit;— that the defendant appeared by his attorney, consented to the filing of the declaration and the order made in the cause, and filed a plea to the declaration, on the said 17th January, 1844. The affiant further sets forth that he is informed by John Paulding, a constable, that he said Paulding, at the request of said Anderson, on the said 19th January, arrested said Brown, and took him to the steamboat Admiral, for the purpose, as said Anderson told him, of sending said Brown south, and that said Brown was put on said boat, which was bound for New Orleans, and which with said Brown has departed for that place; and said Dayton believes, *therefore*, that said Brown is now about being removed out of the jurisdiction of this court.

Thereupon the judge of the circuit court issued a writ to the sheriff of St. Louis county, in which it is recited that he is *satisfied by the foregoing affidavit* that said Brown is about to be removed, &c., and commanding said sheriff to seize said Brown and bring him before the judge on the 20th January instant, at 9 o'clock, A. M., at the county jail, and that he summon to appear, at the same time and place, any person claiming or having in possession said Brown.

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The sheriff returned that on the 20th January, 1844, he seized said Brown, and had him before the judge, as required by the writ, and that he summoned Israel Morris, he being the person who claimed said Brown, and had him in possession, to be and appear at the jail of said county as aforesaid. No further proceedings appear to have taken place before the judge. But afterwards on the 26th January, 1844, the circuit court rendered a judgment in the premises, wherein the foregoing proceeding are recited; and further that said Morris, at the time and place aforesaid, (to wit, 20th January, at the jail, &c.,) though demanded came not; whereupon it is considered by the court, that said Morris and said Anderson pay the costs and charges in this behalf expended, &c.

On the 12th February, 1844, Anderson filed his motion to set aside said judgment as against him, because the same is illegal, having been rendered without authority in law; which motion was overruled. On the 29th of said month Anderson filed another motion to set aside the decision of the former motion, which was also overruled, to which decision of the court the said Anderson excepted, and has brought the case here by appeal.

The appellants counsel insist that the writ was illegally issued, because issued on hearsay testimony alone, and refers to 10 Wend. Rep. 420, where it is held that affidavits of a *plaintiff* that *from reports and information* he believed that his debtor kept out of the county to avoid paying his debts; and of his *witnesses* that *they had been informed* that he had departed, and, *as his creditors* said, for the purpose of defrauding them, are not sufficient to authorize the issuing of an attachment by a justice. By the statute of New York, under which the foregoing proceedings were had, the justice before he is authorized to issue an attachment, is required to have *satisfactory proof* by at least one disinterested witness, &c. In the case referred to in 11 John. R. 175, the court construe the words *satisfactory proof* to mean legal evidence, or such as would be received in the ordinary course of judicial proceedings.

Our statute under which the judge proceeded in this case, differs somewhat from the New York statute. Ours provides, R. C. sec. 4. p. 285, that if the court or judge is *satisfied* that the petitioner is about to be removed out of the jurisdiction of the court, he shall cause the petitioner to be brought up by a warrant under the seal of the court or the hand of the judge. There is certainly a material distinction between the two statutes in this. Under our statute it would be entirely competent for the court or the judge to issue a warrant upon his

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own knowledge of facts, which would authorize the belief that the petitioner was about to be removed, for then he would be *satisfied*. Whilst it has been decided under the New York statute, that a justice could not legally act upon facts within his own knowledge, however well founded, because the statute declares that he must have *satisfactory proof*. See the case in John. Rep. last referred to. But it is not important now to dispose of the point, and we only refer to the authorities cited for the purpose of showing that they are not entirely conclusive on the question.

It is contended that the judgment against Anderson at least was illegal, because he was not summoned under the writ, and had no day in court or other opportunity to defend himself. We are at a loss to ascertain how the proceeding before the judge at his chamber found its way into the circuit court, and became engrafted on the action between the parties in the freedom cause. The writ issued by the judge accomplished its office, when the sheriff made his return on it, and the only reason for summoning the person who had the petitioner in custody, was to afford him an opportunity of showing his right to such possession, and not to answer any further proceedings which it might become necessary to take against him. If the acts of the party in possession amounted to a contempt of the court, or a violation of any of its orders, and for which the party was liable, the court should have instituted proceedings in term time, and caused the party offending to appear in court, and show cause why he should not be adjudged guilty of such contempt and punished accordingly. But if, as the counsel contend, the proceedings against Morris be regular and valid, still as Anderson was not summoned, and for anything appearing to the contrary in the record, had no notice whatever, and may not, in point of fact, have done any act which ought to have subjected him to the payment of costs, it is difficult to conceive upon what grounds the judgment was rendered against him. It is error to enter judgment against a party who has not been served with process, and does not answer to the action; 7 Mo. Rep. 1. It is a principle of universal law, that a judgment rendered against a party who had no notice of the proceedings is utterly void; 7 Mo. Rep. 463.

The circuit court may have proceeded against Anderson, because he was a party to the suit, and had entered his appearance in the cause, and might therefore be considered as in court. But we cannot recognize the correctness of the principle, that when an individual is in court for one purpose, he may be considered in court for any other, or for all purposes. But if it could be so regarded by the court in refer-

 Steamboat Blue Ridge vs. Steamboat Time.

ence to Anderson, and this proceeding is taken as a part of the case of Brown against Anderson, by what principle has Morris been brought in and made a co-defendant, as there is no order of the court making him a party to the suit. Viewed in this light the judgment is erroneous.

For the foregoing reasons, the judgment of the circuit court ought to be reversed, and the other Judges concurring the same is reversed.

 STEAMBOAT BLUE RIDGE vs. STEAMBOAT TIME.

1. A complaint against a steamboat alleged that "Richard Robertson complains that James A. Payne, owner of the steamboat Blue Ridge, has a demand against the steamboat Time, on account of the wrong doing of John H. Baldwin, the master thereof," &c., setting out the destruction of a yawl, is insufficient. The suit can only be brought in the name of the person injured.
2. The warrant of the justice set out that "Payne complains that the steamboat Blue Ridge has a demand against the steamboat Time"—it contradicted the complaint and shewed no right of action in Payne.
3. A steamboat can not under the statute sue for an injury done to her.

ERROR to St. Louis Circuit Court.

GOODE & CORNICK, for Appellant.

POINTS AND AUTHORITIES.

1. The complaint was sufficient and legal. See session acts 1839, p. 13; Dig. 1835, p. 103, § 4.
2. The warrant was defective, but the defendant forfeited all right to take advantage of such defect. See sess. acts 1840-'41, p. 103, § 8 and § 9.
3. Nor could such defect in the warrant have been fatal in any event. See *Sherman vs. The Proprietors of the Connecticut River Bridge*, 11 Mass. 357.
4. The motion on behalf of the defendant steamboat Time, before the justice, to set aside the judgment by default, and before the circuit court to quash and dismiss, were not according to the statute. (See Dig. 1835, p. 103, § 7,) and were void. A motion by a defendant St. Boat, is a proceeding unknown to Admiralty, or Missouri Statute law.

Steamboat Blue Ridge vs. Steamboat Time.

McBRIDE, J., delivered the opinion of the court.

This was a proceeding under the statute, commenced by filing a complaint before a justice of the peace in St. Louis county, when the defendant having made default, a judgment was rendered by the justice in favor of the plaintiff; the defendant appeared within ten days, and moved the justice to set aside the judgment by default, which he over-whereupon the defendant appealed to the circuit court.

In the circuit court the defendant moved the court to quash the writ ruled, for the following causes:

1. The complaint in the above cause is defective and void.
2. The writ is defective and void.
3. There is no complaint filed in the cause as is set forth in the writ.
4. The proceedings are defective, erroneous and void.

The motion was sustained and the writ quashed, to which the plaintiff excepted and appealed to this court.

First. Is the complaint defective and void? It sets forth that "Richard Robertson complains that James A. Payne, owner of the steamboat Blue Ridge, has a demand against the steamboat Time, on account of the wrong doing of John H. Baldwin, the master thereof," &c., which is signed and sworn to by Robertson.

The statute provides that boats and vessels used in navigating the waters of this State, shall be liable for all injury done to persons or property by such boat or vessel; and that suit may be instituted against them by name, for any such injury, by filing a complaint setting forth the plaintiff's demand in all its particulars, and on whose account the same accrued; the complaint to be verified by the affidavit of the plaintiff, or some credible person for him, and shall stand in lieu of a declaration. R. C. 102, and sess. Acts 1838-'9, 13.

The injury complained of is the destruction of a yawl, said to be the property of James A. Payne, by John H. Baldwin, the captain of the "Time." Payne being the individual aggrieved, might waive his right of action, and will be presumed to have done so until a complaint is made in his name. There is nothing in the papers or proceedings in the cause, showing what relation Richard Robertson bears to the parties, or the subject matter in controversy, and he may perhaps very honestly conclude, from his imperfect knowledge of the occurrence, that Payne has been aggrieved by the conduct of the captain of the "Time," whilst Payne, who may perhaps be better informed, may entertain a different opinion. If Payne do not complain, the complaint of no other person is sufficient to authorize the bringing of this action.

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When the complaint is made *in the name* of the party aggrieved, then it is sufficient if the facts set out, are sworn to be true by some credible person.

If this point were susceptible of doubt, that doubt would be at once removed by a reference to the third section of the act, heretofore referred to, which declares "*that any plaintiff wishing to institute suit against a boat or vessel, shall file his complaint against such boat or vessel, by name, with the clerk,*" &c. The *plaintiff shall file his complaint*, which we have seen is to stand in the place of a declaration. If a declaration drawn as this complaint, were submitted to a court, there can be no doubt but it would be held to be defective.

We are by no means disposed to require the observance of much technicality in drawing those complaints, being willing whenever they are intelligible and have substance, to sustain them; but when so defective as the one under consideration, we think they should not be received as the basis of any judicial proceeding.

The warrant issued by the justice of the peace in this case, recites that James A. Payne made his complaint, &c., setting forth that the steamboat Blue Ridge has a demand against the steamboat Time, amounting, &c., and for the particulars of the complaint refers to the statement of Robertson heretofore noticed.

We have seen by the complaint filed, and upon which this warrant issued, that Robertson complained that Payne had a demand against the steamboat Time; and now the warrant recites that Payne complains that the steamboat Blue Ridge has a demand against the steamboat Time, whilst the fact appears to be, that the complaint was made by Robertson, and in his own name. The writ then contradicts the complaint, and shows no cause of action on the part of Payne against the steamboat Time.

But an effort is made to sustain the proceedings, upon the ground that it is one steamboat suing another, and such appears to be the opinion of the justice of the peace, who so entitles the cause in all of his subsequent proceedings. The counsel for the plaintiff say, "for in many cases a steamboat is permitted by the laws of this State to be plaintiff." This we apprehend is an error.

The right to sue a steamboat by name, is derived from the statute, and was suggested doubtless by difficulties which frequently arose in ascertaining who were the owners of the boat, and liable for supplies, repairs, &c., furnished the boat; and after the owners were ascertained, they might be non-residents, and unless they could be reached by an attachment against their property, if found within our jurisdiction, our

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citizens would be remediless. So, whilst there is some necessity for permitting a boat to sue in its own name, its right to do so is given likewise by statute, and is not so general as the liability of being sued, being confined to actions "for freights, money advanced, and all other necessary charges and expenses incurred by and due to such boat, or vessel, in receiving, transporting and shipping of merchandise, produce and other articles transported on board of such boat or vessel." Sess. Acts 1838-'9 p. 13.

The foregoing authority to sue, is not comprehensive enough to authorize the boat to sue in its own name for an injury done to property. The action should, as well as the complaint, have been in the name of James A. Payne, the owner of the steamboat Blue Ridge, whose yawl was destroyed by the act of the steamboat Time, or its officers. It is not deemed necessary further to examine the reasons for quashing the writ and dismissing the cause. We are of opinion that the circuit court committed no error in sustaining the defendant's motion to quash.

The other Judges concurring herein, the judgment of the circuit court is affirmed.

DARBY, ADM'R OF GARRISON, USE OF GIST vs. STEAMBOAT INDA.

1. Under the act regulating the collection of demands against boats and vessels, which requires suit to be commenced within six months from the time the cause of action accrued; the cause of action accrues when the materials are furnished, or the work is done.
2. If a note be given for such work or materials, payable more than six months after the work done or materials furnished, the boat is not liable to be proceeded against under this act, within six months from the time the note shall become payable.

ERROR to St. Louis Circuit Court.

CROCKETT & BRIGGS, for Plaintiff in error.

GEYER, for Defendant in error.

POINTS AND AUTHORITIES.

1. The statute of this State does not impose a lien upon, or authorize an action against a vessel by name, upon a note given by the master—

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such note may be evidence of the amount due, but the cause of action must be alleged and proved to be one of those enumerated in the statute. Revised Code, 1835, p. 102, acts 1838.

2. Both the lien upon the boat and the right of action against her by name, are limited to six months after the cause of action accrued. The timbers furnished, for which the note was given, were furnished before the execution of the note, and more than two years before the commencement of the suit.

3. If the cause of action in this case is the note, then the plaintiff cannot recover, because it gives no right of action against the boat. If the cause of action is the timbers furnished, the plaintiff fails, because more than six months elapsed after that cause of action accrued before suit was brought.

4. The master of a vessel has no authority to bind the owners, still less to impose a lien on the vessel by a note given for a debt contracted in building her, because his authority as captain does not exist before the vessel is built.

5. The master of a vessel has no authority under our law, to extend the duration of the lien given by statute. He may impose a lien for six months, by a contract for supplies, repairs, &c., but he has no power to impose any lien independent of the statute—and by it the lien is the result of the contract, not the act of the master. It is limited to six months without power of extension by any one.

6. Even if it appears that the evidence supports the complaint, the plaintiff could not have judgment, because neither the complaint nor the facts in evidence show any cause of action against the steamboat Inda by name. The work was done and materials furnished more than six months before the commencement of the suit, and this appears as well by the complaint as by the evidence. No particulars are alleged or proved, except that the demand is evidenced by a note made by one Alter, which note is not, and cannot be made a cause of action under the statute. The complaint does not alledge, nor is it proved, on whose account the demand accrued. To whom the timbers were furnished is not stated or proved—it does not appear in the complaint or elsewhere, who contracted for them on behalf of the boat. Upon the whole case the judgment is clearly for the right party, and ought to be affirmed.

McBRIDE, J, delivered the opinion of the Court.

This was an action under the statute providing for the collection of demands against boats and vessels. R. C. 102.

Darby, Adm'r, &c. vs. Steamboat Inda.

The complaint filed in the cause alleges that the defendant is indebted to the plaintiff for work done and materials provided by the plaintiff's intestate, in building the hull of the steamboat Inda; that the demand is evidenced by a note executed by one Alter, captain of the Inda, which is exhibited with the complaint, and is dated 11th October, 1842, and payable on the 1st February, 1844. The defendant filed his demurrer to the complaint; which having been overruled by the circuit court, he obtained leave to withdraw it, and pleaded *nil debet*.

The evidence given on the trial of the issue in the court below, consisted of the note of William Alter, captain, &c., appended to the complaint; an admission of his handwriting, and that he was at the date of the making of the said note, captain of the steamboat Inda, and the testimony of a witness who stated that Hubbard, one of the owners of said boat, told him that the note was given for cylinder timbers, and other heavy timbers, water-wheel beams, and work done on the upper part of the said boat.

The plaintiff having closed his evidence, the defendant offered none, but demurred to the evidence of the plaintiff, and asked the court to render him judgment thereon, which the court did; whereupon the plaintiff moved to set aside the judgment, and for a new trial, which having been overruled, he excepted, and now brings the case to this court by a writ of error.

Waiving all question as to the propriety of the course pursued in this cause in demurring to the evidence, and thereby taking the case from the jury, we will examine the question of law raised by the demurrer.

By the third sub-division of the first section of the supplemental act of 1838, it is provided that a lien shall exist for all materials furnished, and labor done by mechanics, tradesmen, and others, in the building, repairing, fitting out, furnishing and equipping such boat or vessel. It would be under this class the plaintiff's demand would come; and the statute gives him the right of proceeding against the boat by name, and enforcing his lien.

By the twenty-first section of the act of 1835, it is declared that all actions against a boat or vessel, under the provisions of the act, shall be commenced and sued within six months after the cause of such action shall have accrued. When did the cause of action in this case accrue, in the meaning of the statute? The plaintiff insists that it was upon the falling due of the promissory note executed by captain Alter, about sixteen months after the services were rendered by the plaintiff's

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intestate; and that he would have a right to bring this form of action, at any time within six months thereafter.

We are not prepared to sanction this construction of the statute; but think it manifest from the whole scope and object of the statute, that the liabilities provided for by this summary proceeding, are such as the law would raise without any agreement between the parties for time. They are such as would accrue, and upon which an action could be brought within six months after the materials were furnished, or the labor done, in the building, fitting out, or repairing the boat or vessel.

It is a lien which the law gives without the agreement of the parties, and if the parties make a contract contravening the provisions of the statute, and it becomes necessary to bring an action thereon, such action must be brought upon the contract thus made, and under the general law of the land. It is not competent for the parties to enlarge the lien given by the statute, and that it is declared to exist for six months only; any agreement deferring the payment beyond six months after the materials were furnished, would take the *cause of action* out of this statute, and put the parties upon the same footing with all others, and the rights subject to the same general law of the land.

It appears from the complaint, that this action or proceeding is for the furnishing of materials for the building of the boat, and that reference is made to the promissory note of captain Alter, for the amount of the plaintiff's claim or demand. Now if the note affords evidence of the plaintiff's demand, that demand must have accrued prior to the date of the note, to-wit: the 11th October, 1842, and the suit should have been instituted, (if intended to be under the statute giving a lien,) within six months next after the date of the note; whereas it was not brought until the 24th of March, 1844. If the suit was intended to have been brought upon the note, which gives the defendant about sixteen months for payment, then the plaintiff misconceived his remedy, for no action will lie under the statute, upon such an instrument.

For the foregoing reasons, we are of the opinion that the circuit court committed no error in sustaining the defendant's demurrer; and that its judgment should be affirmed; and the other members of the court concurring, the judgment of the circuit court is affirmed.

Benoist & Hackney vs. Siter, Price & Co.

BENOIST & HACKNEY vs. SITER, PRICE & CO.

A negotiable note given by Blow to Siter, Price & Co., was placed in the hands of one Anderson for collection—by him it was transferred to B. & H. to whom Anderson was largely indebted, and the amount placed by them, to Anderson's credit, upon their books. Held—that notice to B. & H. at the time they gave the credit to Anderson; that the note belonged to S. P. & Co, is sufficient to make them liable for the amount and interest to S. P. & Co.

ERROR to St. Louis Circuit Court.

SPALDING & TIFFANY, for Appellants.

POINTS AND AUTHORITIES.

I. The court erred in giving the instruction asked for by the plaintiffs below.

1. That instruction assumes that the defendants knew that the note in question belonged to plaintiffs; and that they knew this at the time they credited Anderson with the proceeds of said discounted note.

2. It assumes that said note at the time it was discounted, belonged to the plaintiffs.

3. It places the point of protection to the defendants below at the passing to the credit of Anderson, the proceeds of the note on the books of the defendants; whereas it should have been at the payment over of such proceeds. For if they took the note and gave Anderson the proceeds of the discount, they are not liable to plaintiffs even though they should have been notified of plaintiff's ownership of the note immediately after, and before the defendants made their entries in their books.

4. The instruction is involved, and calculated to mislead the jury.

5. It authorizes a recovery by plaintiffs if the defendants ever knew that the note had belonged to plaintiffs, *no matter at what time it belonged to them, provided they knew at the time they credited Anderson with the amount that said note did not belong to him.*

II. The instruction asked by defendants should have been given. It submitted to the jury the questions of fact, and confined the knowledge of the defendants of the plaintiff's ownership of the note which should make them liable, *at the proper point, to-wit, before or at the time of accounting to Anderson for the proceeds of the note.*

III. The two instructions are not identical, as is apparent in comparing them.

IV. If they were substantially of the same effect, yet as they are circumstantially different, the latter should have been given, as it was the

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law of the case, and the court by rejecting it, probably prejudiced the case before the jury.

V. A negotiable note or bill, passed by the holders before due to a bona fide purchaser, without any notice of the holders want of title, belongs to such purchaser, even though the holder might have no interest in it whatever. Chitty on Bills, 222, 221; Story on Bills 209-10.

VI. The motion for a new trial ought to have been sustained.

GAMBLE & BATES, for Appellee.

POINTS AND AUTHORITIES.

I. The instruction given on the part of the appellees was lawful and proper, in view of the testimony in the cause, and,

II. That there was no error committed in refusing the instruction moved on the part of L. A. Benoist & Co.

1. That the instruction given was right, seems susceptible of the plainest kind of demonstration. The matters of fact being submitted to the jury, they have found that L. A. Benoist & Co. at the time they gave the credit to Anderson—that is when they discounted the note—"knew that the note was at the property of Anderson," and at the time that they received the proceeds, "knew that said note belonged to the plaintiffs." If with a knowledge of these facts, they be not liable to this action, it must be because they could lawfully buy a note from a man who *they knew* did not own it, and lawfully receive and keep to their own use, money which they knew at the time belonged to other people.

That there was sufficient testimony in the cause on which to base the instruction is equally clear. And first it is plain from the testimony of several witnesses, that L. A. Benoist & Co. knew that Anderson was a collecting agent for Siter, Price & Co., Anderson himself testifies that he told them so; and that in point of fact, he did not *sell* them the note, but lodged it in their bank *for collection*. When due, Anderson, avowedly as the agent of Siter, Price & Co. still controlled it: As such he held negotiations with the drawers and gave them time, while L. A. Benoist & Co. did not *act* as owners, nor treat Siter, Price & Co. as *their* endorsers. If then, they had really claimed to be owners, and acted as such, if not constrained by a prudent regard for their own interest, at least, mercantile usage, good faith and common fairness to the other parties to the transaction, would have required them to deny Anderson's agency, to protest the note for non-payment, and give notice to the endorsers in Philadelphia. If that had been done,

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Siter, Price & Co. would have been warned that their agent instead of collecting their note had faithlessly sold it, and being warned, they as business men would have promptly looked after their own interests and might have saved not only the amount of that note, but some thousands more now lost in Anderson's bankruptcy.

Again—the note was never *assigned* to any body. The endorsements of Siter, Price & Co. and of John J. Anderson, are still *in blank*. There is nothing in full on the back of the note but the *receipt of L. A. Benoist & Co.* Now a *blank* endorsement is not *per se* a transfer or assignment; it is but a *power*. The payer when he takes it up may write a receipt over the name; and before payment, a *bona fide* holder may fill it up to himself. The *blanks* were not filled by either Anderson, or L. A. Benoist & Co. Neither of them pretended to be a *bona fide* holder. Nobody questioned the title of Siter, Price & Co. until Anderson's downfall was seen to be inevitable, and then there was a scramble for his assets.

And again—it is in proof that Anderson had extensive dealings with L. A. Benoist & Co. and was largely their debtor. Their business relations were constant and confidential, and hence with the sagacity belonging to the trade of banking and brokerage, they must have understood his pecuniary situation, and have foreseen his bankruptcy. In this view it is not hard to account for the fact, that when he left the note *for collection*, they thought fit, (unknown to him and as he swears against his intention) to pass the note on their books, through the forms of a regular discount, and without paying a dollar, credit the proceeds to his account, against a debt then dangerously large, and now hopeless of payment. This nominal discount of the note and giving credit to Anderson's account, it is apparent was the exclusive and one sided act of L. A. Benoist & Co. Anderson testifies that it was not *his* intention to have it so, and that he had no knowledge of the fact until long afterwards. But even if he had concurred in all that was done, still the legal and honest result would remain the same. For Benoist having knowledge of the facts as stated in the instruction, any bargain between him and Anderson, whereby Siter, Price & Co. would lose title to their note, and be deprived of money honestly theirs, would be a fraud too palpable and gross for the law to tolerate. They could not be allowed to cheat Siter, Price & Co. out of their money, by any private arrangement between themselves, and this would undoubtedly be the case if Benoist knowing the facts, be allowed to keep the money.

Anderson having the *fiduciary* possession of the note, with a blank

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endorsement (which is but a power to transfer) might abuse his trust and pervert his power by making a valid transfer to a *bona fide* purchaser for a valuable consideration *without notice*. But any other transfer would be fraudulent and void.

2. The instruction prayed by the defendants was well refused.

The main principle involved in the refused instructions—i. e., the knowledge by Benoist, that Anderson *did not*, and that Siter, Price & Co. *did*, own the note—is identical with the instruction given, and therefore need not be repeated to the jury.

But besides this, it was rightly refused, because it contained expressions ingeniously interwoven which were calculated to mislead the jury. For instance, the instruction assumes that Benoist & Co. were not liable unless it appear to the jury that the note was the property of the plaintiffs, "and that the defendants had *notice* therefore *before* said Anderson *received* the proceeds of said discount." If the word *notice* was designed to have a meaning more extended than, or different from *knowledge*, it was calculated to mislead and was wrong. The word *before* would alone make the instruction illegal; if they knew the fact *at the time* of the discount and credit, as imported in the instruction given, "it is enough to bar their claim of the money." "Before Anderson *received* the proceeds. This phrase is deceptive and might well lead the jury to believe that it was an established fact that Anderson had in reality *received the proceeds*, which we think is plainly disproved.

If it be contended at the hearing, that the verdict ought to have been set aside upon the facts, I have only to say that the only important question of fact before the jury, was Benoist's knowledge of the condition and ownership of the note, and the bill of exceptions shows that there was ample testimony on that point, which I shall not restate here, as I suppose it has been sufficiently referred to under the first head.

As to the amount of damages, I suppose the amount is right, but if it appear that any error has crept in, by miscalculation of interest or the like, that can be corrected by a *remittitur* of the excess.

McBRIDE, J., delivered the opinion of the court.

Siter, Price & Company, plaintiffs below, brought an action in assumpsit against Benoist & Hackney, on the common money counts, in the St. Louis court of common pleas, returnable to the November term, 1842. The defendants pleaded non-assumpsit, and the cause was tried on that issue, on the 3d October, 1844, when a verdict and judgment

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were given in favor of the plaintiffs for \$2688 98, from which the defendants appealed to this court.

A motion was made in the court below, to set aside the verdict, because it was against evidence, against law, against the weight of evidence; because the court gave improper instructions and refused to give instructions asked for by the defendants; because the damages were excessive and not warranted by the evidence, and that the court improperly excluded evidence offered by the defendants. This motion was overruled by the court and the defendants excepted.

It appeared in evidence on the trial in the circuit court, that Benoist & Hackney were exchange brokers in large business in St. Louis, with whom one John J. Anderson, at that time a merchant in St. Louis, was in the daily habit of business in their line, and of getting notes discounted; that on the 18th January 1842, said Anderson got discounted with the defendants a note of the following tenor:

"\$2437 96

"PHILADELPHIA, Jan. 13, 1841.

"Fifteen months after date, we promise to pay to the order of Siter, Price & Co. twenty-four hundred and thirty-seven dollars 96 cents, with the current rate of exchange on Philadelphia, negotiable and payable at the office of the St. Louis Perpetual Insurance Company, without defalcation for value received. P. E. Blow & Co."

On which were the following endorsements:—

"No. 8163.

P. E. Blow & Co. \$2437 96.

Phil. Exchange due 13-16 Feb. 1842.

Siter, Price & Co.

John J. Anderson.

Rec'd. Payment, L. A. Benoist & Co."

The defendants' clerks testified that the note was discounted by defendants, was so marked, and entries of the discount thereof were made in the usual name in their books, and that said Anderson received the proceeds thereof, which was about one month before the note became due. It was also in evidence that Anderson before that time had got notes, payable to the same payees and endorsed by them, discounted at said defendant's office, and at other places in St. Louis. That the proceeds of said note were paid to said Anderson, at the time it was discounted by entering in his bank book, which was balanced several times after the credit had been so entered; that Anderson about this time had largely overdrawn his credits.

John J. Anderson testified that the said note was the property of the

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plaintiffs, and that he was the agent of the plaintiffs for collection, and that the said note was left by him with the defendants for collection, and that he thought they knew at the time, that it belonged to the plaintiffs, though he could not say that he told them so—that he had written to Mr. Darby that said note was discounted, but afterwards told him that it was not discounted. He further stated that there were two other notes, having the same makers, payees and endorsers, that had been discounted by the defendants, though he had forgotten that fact; and that he did not remember of ever having got other notes belonging to Siter, Price & Co. discounted at other places.

It was also in proof, that in the fall of 1841, and the beginning of 1842, Siter, Price & Co. sent a large number of notes to Anderson for collection, some of which he collected, and others he got discounted. That Anderson's books were kept irregularly, and the cash account would not balance by one hundred thousand dollars, and could not be corrected or explained—that Anderson failed in May 1842, and that for some months prior he was hard pressed for money, and occasionally raised money by getting the notes of Siter, Price & Co., which he held as agent, discounted at different places, and then entered them in his *bills payable*, to be provided for by him as they matured.

On this state of evidence, the plaintiffs asked the court to give the jury the following instruction:

"If the jury believe from the evidence that the defendants received the proceeds of the note of P. E. Blow & Co. which has been given in evidence, and that they knew that the said note belonged to the plaintiffs; they are answerable for the amount received by them, notwithstanding the defendants may have passed the amount thereof on their books to the credit of Anderson, if the defendants knew at the time of making such credit, that the note was not the property of Anderson."

Which the court gave and the defendants excepted; thereupon the defendants prayed the following instruction:

"If the jury find from the evidence, that the note given in evidence was endorsed by the plaintiffs and John J. Anderson, and was discounted by the defendants for said Anderson—that he was paid the proceeds or was credited therewith on his account with the defendants, the plaintiffs are not entitled to recover on account of any money received by defendants in payment of said note or any part thereof, unless it appears to the satisfaction of the jury that said note was the property of the plaintiffs, and the defendants had notice thereof, before said Anderson received the proceeds of said discount."

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Which the court refused to give, and the defendants excepted.

Did the court of common pleas err in giving the instruction prayed for by the plaintiffs, and in refusing the one asked by the defendants? It is conceded on the part of defendants, that to protect them against the claim of Siter, Price & Co. they must have been *bona fide* purchasers of the note of P. E. Blow & Co. from Anderson—without notice—and have paid Anderson the proceeds thereof. But if they had notice of the ownership of Siter, Price & Co., at what period must they have obtained it to charge them in this action? It need not have been at the time the note was discounted, but if the fact came to their knowledge at any period prior to the payment of the proceeds to Anderson, it would be sufficient, as then the defendants would have it in their power to save themselves from any loss arising out of the faithless conduct of the plaintiff's agent. The instruction given fixes the notice at a period of time as favorable to the defendants as they could reasonably desire, that is, when the credit was made to Anderson on the defendant's books.

Prior to this time, the defendants had incurred no liability to Anderson, for the proceeds of the note on Blow & Co. and had assumed no relation to that note by which they would have been affected by the question of ownership.

We are of opinion that the court committed no error in giving the plaintiff's instruction.

Did the court err in refusing to give the instructions asked by the defendants which they say is not identical with the one given, as is apparent from comparing them; but "if they were substantially of the same effect, yet as they are circumstantially different, the latter should have been given as it was the law of the case, and the court by rejecting it probably prejudiced the case before the jury." The two instructions are substantially the same, and the court might have given them both without committing error; but as the one given embraces the same principle, the refusal to give the other is no cause for reversing the judgment.

The other grounds taken for a new trial are not sufficient. If the plaintiffs have a right to recover at all, they were entitled to a verdict for the full amount of the note of P. E. Blow & Co. with interest, &c. There was evidence before the jury from which they might have found, as they did, and this court will not undertake to weigh the evidence, to see if the jury may not possibly have committed an error, or as readily have found a contrary verdict.

The other judges concurring, the judgment of the court of common pleas is affirmed.

JANUARY TERM, 1846.

SIMMS vs. LAWRENCE, ASSIGNEE.

In an action upon an assigned note, the assignment must be proved.

ERROR to Greene Circuit Court.

SCOTT, J., delivered the opinion of the Court.

Lawrence, assignee of Josiah Burney, sued Simms in a justice's court, on a note executed by Simms to Burney, and assigned to Lawrence. On the trial in the circuit court, the note and the assignment thereon, were read in evidence, but no proof was made of the assignment. Simms objected to the reading of the assignment without proof of its having been made, but his objection was overruled, and a verdict and judgment having been rendered against him, he sued out this writ of error.

It is clearly settled, that under the statute, an assignment vests the title of the instrument in the assignee, and that the suit must be brought in his name. By the assignment the assignee becomes the legal owner, and the assignment is the evidence of his right to sue. The assignment is no part of the instrument, and proof of its execution is not dispensed with, under the statute which exonerates a party from proof of the execution of the instrument which is the foundation of the action, until the execution thereof is denied, and the denial verified by affidavit. As the assignment was the foundation of the plaintiff's right to sue, proof of its execution was indispensably necessary in order to obtain a recovery.

The other Judges concurring the judgment will be reversed, and the cause remanded.

Lester vs. The State.

LESTER vs. THE STATE.

1. In an indictment for murder, where the killing is charged to have been from a battery, it is necessary to aver an assault.
2. The time of the stroke and the death must be given. The words "instantly did die," do not sufficiently charge time and place.

APPEAL from Jackson Circuit Court.

GEORGE TOMPKINS, for Appellant.

Lester was condemned to be hanged, by the circuit court of Jackson county, on the 2d January, in the year 1846. He moved in arrest of judgment, and his motion was overruled. The only point relied on, is that the indictment is grossly defective, for the reasons following :

1st. There is no description of the mortal wound in either of the four counts of said indictment.

2d. It is not stated in either count that this mortal wound was inflicted with the same stick with which the assault was made, &c.

3d. It is not stated either when or where the mortal wound was given.

4th. It is not stated in either the 1st, 3d or 4th counts, when or where the death occurred.

5. The second count does indeed state when and where the death occurred, but it is liable to all three of the objections first above assigned.

The giving of the mortal stroke is in all four counts thus expressed : "Giving him, the said King B. Scott, by such striking and beating, divers mortal bruises and contusions," without stating either the time or place of giving those mortal bruises, &c.

The death is thus stated in all the counts but the second, "of which said mortal bruises and contusions, he the said Scott did instantly die," without any statement of either time or place.

The second count is not indeed liable to this last objection, the death being herein stated with the circumstance both of time and place. But in this second count, besides the objection above made to it, there is no statement of an assault made by Lester on the deceased; and for any thing in that count stated, the mortal stroke might have been given to prevent a violent and dangerous stroke from the deceased.

STRINGFELLOW, Attorney General, for the State.

Lester vs. The State.

NAPTON, J., delivered the opinion of the Court.

The appellant was indebted and found guilty of the murder of one King B. Scott. After verdict, a motion in arrest of judgment was made, which being overruled, the case is brought to this court.

The only question presented by the record, is the one arising from the motion in arrest. The indictment consists of four counts, the first, third and fourth of which are in all respects, material to the question, precisely alike. The second count is different. In the first count it is alleged that the defendant, with force and arms, at, &c., on, &c., "in and upon one King B. Scott, in the peace of the State, &c., feloniously, wilfully and of his malice aforethought, and by laying in wait, did make an assault, and that the said Lester did then and there, with force, &c.," "and with a large stick of no value which he the said Lester in both the hands of him the said Lester, then and there had and held, him the said Scott in and upon the head of him the said Scott, feloniously, wilfully, and of his malice aforethought and by laying in wait did strike and beat, giving him the said Scott by such striking and beating, divers mortal bruises and contusions in and upon the head of him the said Scott, of which said mortal bruises and contusions he the said Scott *did instantly die*, and so the jurors," &c.

The second count omits any averment of an assault, and charges the infliction of the mortal wound, in the same manner it is charged in the other counts, but gives a venue to the death.

Time and place must be stated to the allegation both of the injury and the death, in order that it may appear that the charge is cognizable by the court. 2 Chitty Cr. L. 737; Cro. Eliz. 738; 2 Hale, 179. Here the word *instantly* seems designed to supply the place of the words *then and there*; and the attorney general insists that both in its popular and proper legal acceptance, it will embrace every thing which is conveyed by those words. This may be true so far as time is concerned, but in capital cases, it has been thought expedient to require great strictness, and it would be difficult to foresee to what extent innovations would go, if we lose sight of the established precedents, so far as they fix the form of material averments. In East's Pleas of the Crown, it is said, "The respective times of the wound and death are also required to be shewn, in order that it may appear that the deceased died within a year and a day from the stroke or other cause of death; in the computation of which, the day on which the act was done shall be reckoned the first. This may be done, either by stating that he died instantly of the wound, or that he languished of the same till the day

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mentioned, when he died of the mortal wound." From this observation, as well as from an examination of the precedents, it may be inferred that the word *instantly* does not supply the place of *then and there*, but is used to contradistinguish a case of death immediately succeeding the blow, and a case in which the death does not occur on the day the mortal blow was given. The statement of time and place is necessarily joined to either allegation. The only instance in which this has been omitted, is in the case of *Rex. v. Hindmarsh*, 2 Leach, 571. The indictment in that case is inserted by Chitty among his precedents, and from the note in *Russell*, (1 Russ. on Cr. 474,) it seems not to have been objected to, upon the trial. No question was made as to its sufficiency, but as it conflicts with the principles governing the constructions of indictments laid down by Hale, East, Bacon and Chitty himself, in the same work in which it is copied, and in this respect is unsupported by any other precedent, we do not feel ourselves at liberty to admit its authority.

Whether the statement of time and place must accompany the allegation of giving the mortal blow, as well as the preceding charge of giving the stroke, it is not material to determine. It is certainly safer to follow the precedents, and specify time and place, whether the allegation be *percussit dans* or *percussit et dedit*. The second count is however defective in omitting any averment of an assault.

Judge SCOTT concurring, the judgment of the circuit court is reversed.

McBRIDE, J., dissents.

EX-PARTE, TATE.

The collectors are entitled to a fee of twenty-five cents for each tract of land or town lot - "bid in" by them for the State at the sales for taxes, under the act of 1845 providing for levying, assessing and collecting the revenue.

Petition for Mandamus.

NAPTON, J. delivered the opinion of the court.

This was a petition by the collector of Lewis county for a mandamus upon the auditor of public accounts. The petition alleges, that by virtue of the act, "to provide for levying, assessing and collecting the rev-

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enue," approved 27th March, 1845, the petitioner, as collector of Lewis county, did offer for sale the several tracts of land and town lots advertised to be sold by the register of lands, and that at such sale, there being no other bidders therefor, he did in pursuance of the ninth section of the fifth article of said act, bid in for the State three hundred and fifty-two tracts for the taxes, interest and costs due thereon, and that he presented to the auditor of public accounts a certificate of the register of lands setting out the number of tracts and town lots so sold to the State. The petitioner further alledges, that on a settlement with the auditor, he paid into the treasury the full amount of the proceeds of such sales, deducting the fees allowed by law for advertising and selling, and claimed a credit of eighty-eight dollars, that being the amount of fees due upon three hundred and fifty-two tracts of land and town lots sold by the petitioner to the State of Missouri. The credit not being allowed by the auditor, the petitioner prays for a mandamus, &c.

The answer of the auditor admits the facts as stated in the petition, but relies upon the provision of the act above referred to, as not authorizing the allowance of this fee to the collector.

The 22d section of the 5th article of the act fixes the compensation of the different officers who are concerned in its execution. By this section, the collector is allowed five cents for advertising each tract or town lot, when that advertisement is made in a newspaper, and ten cents for each tract when the advertisements are put up in the township, and twenty-five cents for each tract of land or town lot that may be redeemed, and the sum of twenty-five cents for every piece of land or town lot "sold by him."

The construction put by the auditor upon this last clause, is that the collector is only entitled to the fee of twenty-five cents for each tract or town lot sold to individuals. The auditor supposes the fee designed to be a compensation to the collector for his trouble in writing a certificate where he sells to an individual, or a receipt where a tract or lot is redeemed; and inasmuch as no such certificate is given where the land is bid in for the State, the collector is not entitled to any fee. It is further insisted, that under the provisions of this law, there cannot in truth be any sale to the State, in the proper legal sense of that term: that the State acquires no title, in any event, or upon any contingency, and therefore it would be a misnomer to speak of a sale to the State. This construction the auditor thinks is strengthened by an examination of other sections, in which the words used in the 22d section, "lands

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sold," obviously do not mean lands sold to the State, but only those purchased by individuals.

On the other hand, we are referred to several sections of the act, in which these terms are used to embrace sales to the State as well as to individuals.

The ninth section requires the collectors to expose for sale all the lands remaining unredeemed on the first Monday of October, for the taxes, interest and costs due thereon, and to sell so much of the tract as will pay the taxes, interest and costs; and if no person will pay this amount the collectors are directed to *bid them in for the State*, and not expose them again for sale. The tenth section directs the collector to make out a list of the lands and lots exposed to sale, with a description of them, stating *to whom sold—whether to an individual or the State*.

There is certainly much difficulty in giving any very satisfactory construction of this act. To reconcile all its provisions with each other is impossible. It will be seen that in many of the sections, the term "lands sold" is applied exclusively to lands sold to individual purchasers; in others, the term applies both to sales to the State and to individuals. The meaning of the phrase in the sections referred to, is fixed by the context. In the 22d section, the clause which gives the fee of twenty-five cents for every tract sold by the collector is isolated, and there is nothing in the context, or in any other portion of the act, from which any inference can be drawn either one way or the other. The words themselves are clear enough, and broad enough to embrace sales to the State as well as to individuals; and under such circumstances we are unable to see any principle upon which they can be limited or restricted.

It is supposed that the fourteenth section presents an insuperable obstacle to this construction. This section provides for the redemption of the lands sold within two years, and prescribes the terms upon which this can be done; and the last clause further provides for the penalty in case a purchaser of lands sold for taxes shall suffer them to be sold a second time. It is certain that this last clause of the section does not apply to the State, but we see no reason why the State may not be embraced among the purchasers mentioned in the first part of the section. The supposed conflict which such a construction would create between this and the fifth section is easily reconciled. The register in certifying out the taxes, interest and costs due upon the land, which had been offered for sale the previous year, and bid in by the state, would only place the State upon the same footing with private purchasers, by adding the hundred per cent.

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The construction contended for by the auditor would present the singular circumstance, that between the 1st Monday of October and the first of June, lands could not be redeemed, though the manifest spirit and intent of the whole law is to procure revenue at as little inconvenience to the tax payers as practicable.

Admitting, however, this construction to be doubtful, and that the fourteenth section does not embrace lands sold to the State, the argument remains where it was before. In many provisions the words are used in this sense, and in others, perhaps, they are not so used. There is nothing inferrable from this circumstance against the plain, natural and ordinary import of the language. As to the title which passes by these sales, either to individuals or to the State, we do not see that the present case requires any such investigation. The tenth section speaks in terms, of land sold to the State; the twenty-second section allows the fee of twenty-five cents for each tract sold, not restricting the fee or tax to any particular kind of class of sales, and whether any title passes either by one sale or the other is not material. The collector puts up the tract or lot, and informs the by-standers of the amount for which the tract or lot can be bought. In ascertaining this amount, he includes the fee of twenty-five cents allowed him by law. Does the law deprive him of this fee, because he buys in the land for the State? We think not.

Let the peremptory mandamus go.

WITT vs. THE STATE.

On an indictment for larceny, the court instructed the jury: "If the jury believe from the evidence that the horse belonged to Smith, and that the prisoner took and carried away the horse, without the knowledge and consent of Smith, with the intention of selling him or of converting him to his own use, they ought to find him guilty. And although the jury may believe from the evidence that Smith, in the contract spoken of had agreed that the prisoner might ride the horse, yet if they believe the prisoner took the horse with the intention of selling him, or of converting him to his own use, they ought to find him guilty."

Held,

That this instruction was erroneous, the facts assumed being such as only to constitute a trespass.

APPEAL from the Polk Circuit Court.]

Witt vs. The State.

SCOTT, J. delivered the opinion of the court.

Witt was indicted, convicted and sentenced to imprisonment in the penitentiary for stealing a gelding, the property of S. Smith. After the close of the evidence tending to show that the horse was taken by the prisoner, sundry instructions were asked and refused on behalf of the defence. The court then gave the following instruction which was excepted to by the prisoner: "If the jury believe from the evidence that the horse belonged to Smith, and that the prisoner took and carried away the horse, without the knowledge or consent of Smith, with the intention of selling him, or of converting him to his own use, they ought to find him guilty. And although the jury may believe, from the evidence, that Smith, in the contract spoken of, had agreed that the prisoner might ride the horse, yet if they believe the prisoner took the horse with the intention of selling him, or of converting him to his own use, they ought to find him guilty."

The legality of the conviction must depend on the propriety of the foregoing instruction. Larceny is defined to be the wrongful taking and carrying away of the personal goods of any one from his possession, with a felonious intent to convert them to the use of the offender without the consent of the owner. E. P. C. 553. The taking must be done *animo furandi*, or as the civilians express it, *lucri causa*. Every felony includes trespass, and every indictment for larceny must have the words *felonice cepit*, as well as *asportavit*. The felonious intent is the material ingredient in the offence. To constitute this offence, therefore, in any form, there must be a taking from the possession, a carrying away against the will of the owner, and a felonious intent to convert it to the offender's use. 3 Chit. 675. There must be a felonious intent, and where goods are taken possession of on a claim of right, although that right may be unfounded it is not a felony. Hawk. What acts constitute this felonious intent, is a matter of great difficulty. Sir William Blackstone says, the ordinary discovery of a felonious intent, is when the party doth it clandestinely, or being charged with the fact denies it. But this is by no means the only criterion of criminality. For in cases that may amount to larceny, the variety of circumstances is so great, and the complication thereof so mingled, that it is impossible to recount all those which may evidence a felonious intent or *animum furandi*; wherefore they must be left to the due and attentive consideration of the court and jury. 4 Com. Chitty says, when the taking exists, but without fraud, it may amount only to a trespass. This is a point frequently depending on circum-

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stantial evidence, and to be left to the jury's decision. 1 Chit. Archibold says, in all cases of larceny, the questions whether the defendant took the goods knowingly or by mistake, whether he took them *bona fide*, under a claim of right or otherwise, and whether he took them with an intent to return them to the owner, or to deprive the owner of them altogether, and to appropriate or convert them to his own use, or fraudulently, and to deprive the owner of them altogether, are questions entirely for the consideration of the jury, to be determined by them upon a view of the particular facts of the case. 180.

A claim to the property stolen is frequently set up as a defence in prosecutions for larceny. It is always a question for the jury, whether such a pretension is an afterthought, to screen a felonious intent, or whether the property was taken in good faith, under a belief that the party had a right to it. If the bare assertion of a claim to stolen goods shall prevent a conviction for larceny, there is no protection to property against the invasions of depredators.

It will thus be seen from what has been observed, that there cannot be a larceny without a felonious intent. That the taking the personal goods of another without this intent, may be a trespass, but it cannot amount to larceny. The prisoner, then, might have done every act supposed by the instruction of the court without being guilty of a felony. The instruction defined a trespass, and not a larceny, and it was error to have told the jury that the commission of the acts mentioned in it, rendered the prisoner guilty of larceny.

The other Judges concurring, the judgment will be reversed, and a new trial had in the cause.

RANKIN & RANKIN vs. CHILDS.

McCourtney applied to Rankin to purchase lumber for building a ferry-boat. Rankin refused to credit him without security. McC. mentioned the name of Childs as security. C. was accepted as sufficient. A few days after, McC. presented a bill of the lumber, in Childs' handwriting, at the foot of which was written:

"Messrs. Rankins will furnish the above bill as soon as possible, and I will order what more I may want for my boat, in a short time. JAMES MCCOURTNEY."

"I hereby guarantee the payment of the above bill. January 29, 1842.

WM. CHILDS."

It was also in evidence that the lumber was delivered, and that whilst the boat was being built, Childs was frequently present, as a visitor, but took no part in the matter.

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Held,

1. That Childs' contract was not a direct promise, but a mere guaranty.
2. Although a man may bind himself to pay the debt of another, yet to do so, his intent must be clear, and he must use apt words for the purpose.
3. It is of no importance that the bill was made out by Childs, and that the guaranty was on the same piece of paper.
4. To make Childs liable, notice should have been given him of the acceptance of his guaranty, and of the failure of McCourtney to pay, after demand made.
5. Such demand should have been made, and notice given in a reasonable time.
6. The notice of the acceptance may be shewn by circumstances, and is a matter for the jury.
7. If the party to whom the credit was given, were insolvent, and the guarantor knew it, no demand need be made.

APPEAL from Cooper Circuit Court.

PEYTON R. HAYDEN, for Appellants.

1. In the argument of this cause the counsel for appellants will insist that the guarantee of Childs to pay for the building materials which were sawed and furnished by plaintiffs to McCourtney, as therein and thereby specified, was and is a direct unconditional and positive undertaking on his part, and not a collateral or conditional one; and that the plaintiffs, to sustain their action were only bound to prove the making of the guaranty, and the delivery of the materials to McCourtney, mentioned in the bill therefor, as made out by Childs; and that it was not necessary for plaintiffs to prove that they had given Childs notice prior to the commencement of their suit, that they had furnished said materials to McCourtney.

2. That if it were necessary to prove that plaintiffs had given notice to Childs, that they had furnished and delivered to McCourtney said building materials, as mentioned in the bill therefor, and that McCourtney had not paid them therefor, yet the court erred in giving the jury the instruction prayed for by defendant; because the question of notice was a fact for the decision of the jury, and upon which plaintiffs had given evidence, from which the jury might, and ought to have found that fact, if they had been permitted to have decided it.

Rankin & Rankin vs. Childs.

STUART & MILLER, for Appellee.

The appellee will insist that that evidence in the cause was insufficient to entitle the plaintiffs to a verdict against the defendant Childs, (now sole and surviving defendant,) and who could only have been made responsible to plaintiffs, as the guarantor of his original co-defendant McCourtney.

2. That as the defendant Childs, was only responsible in the capacity of guarantor, and as his offer to guaranty was made prior to the sale and delivery of the lumber by the plaintiffs to McCourtney, it was necessary in order to charge the defendant, Childs, that the plaintiffs should have given him reasonable notice of their acceptance of his guaranty, after it was given, and before the commencement of their suit against him.

3. That in an action against a guarantor, unless his agreement to guaranty be absolute and conclusive, the plaintiff must show that he gave notice to the guarantor, that he accepted it as such, and notice of the amount of the debt, and of non-payment by principal; and as no such notice was proven in this case, the court did not err in its instruction to the jury, and in overruling the plaintiff's motion for a new trial. See 2 Stark. Evidence 371-2; Cond. Repts. 423-5; 5 Mo. Repts. 504; Scott vs. Anthony, 7 Cranch 69; Russell vs. Clark's Ex'r, 1 Mason's Repts. 323; Cramer vs. Higginson and others; Russell vs. Perkins, 1 Mason 371; 7 Peters 125; Douglass et al. vs. Reynolds et al; 10 Peters 494; 8 Pickering 423; 24 Pickering 250.

McBRIDE, J., delivered the opinion of the court.

This was an action of assumpsit, brought by William and Smith Rankin, against the defendants, Childs & McCourtney, in the Cooper circuit court, at the June term 1843. The declaration contains two counts; the first for joists, plank, and other building materials, sold and delivered to the defendants, for the work and labor of the plaintiffs, done at the request of defendants; for money paid, laid out, and expended; for money had and received, and on an account stated. The second count, and the one upon which the plaintiff mainly sought to recover against the defendant Childs, set forth and alleged that the plaintiffs, at the request of McCourtney, sawed and delivered to him a large quantity of materials for the building of a ferry-boat; and upon the delivery and acceptance of the said materials to the defendant, McCourtney, the said Childs and McCourtney guarantied the payment of as much money

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therefor as they were reasonably worth. The defendants pleaded non-assumpsit.

At the March term 1845, the plaintiffs, having suggested the death of McCourtney, abated their suit as to him, and went to trial against the surviving defendant, Childs. After the plaintiffs had closed their evidence, the defendant by his counsel, moved the court to instruct the jury that the plaintiffs could not recover, and were not entitled to a verdict upon the evidence given in the cause. The court instructed the jury accordingly, whereupon the plaintiffs took a non-suit with leave to move to set the same aside. A motion was made by the plaintiff's attorney, to set aside the non-suit, and grant a new trial, because the court erred in giving the instruction prayed for, which being overruled the plaintiffs excepted, and have brought their case here by appeal, and seek a reversal of the judgment of the circuit court.

The principal question in this case arises on the instruction given to the jury by the court; and whether that instruction be correct or not, depends upon the legal import of the defendant Childs' undertaking. In construing this transaction, as well as all others, it is the duty of the court to ascertain with as much certainty as practicable, what was the intention of the contracting parties, and to give effect to that intention. Whenever parties may legally contract, the law permits them to do so upon their own terms and conditions, and does not assume to make contracts for them. Neither will the courts, when their aid is invoked, undertake to vary the terms and conditions agreed upon between them.

Justice Thompson, in the case of *Lee vs. Dick*, 10 Peters, 492, says, "A guarantee is a mercantile instrument, and to be construed according to what is fairly to be presumed, to have been the understanding of the parties, without any strict technical nicety."

The evidence shows, that the defendant McCourtney, desiring to build a ferry-boat for his own use, called upon the plaintiffs, who were owners of a saw-mill in the vicinity, to purchase lumber for the construction of his boat. The plaintiffs refused to credit him for the lumber, as he was a stranger to them, unless he would give them security for the payment thereof, whereupon McCourtney mentioned the name of his co-defendant Childs, as such security, who plaintiffs said was good: that a few days thereafter McCourtney returned to the plaintiff's saw-mill, and delivered to them a written bill, purporting to be in Child's hand-writing, specifying the building materials, &c., to be sawed and delivered by the plaintiffs to McCourtney at the place of building the boat; at the foot of the bill is the following: "Messrs. Rankins

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will furnish the above bill as soon as possible, and I will order what more I may want for my boat in a short time.

JAMES McCOURTNEY.

I hereby guarantee the payment of the above bill.

Jan. 29. 1842.

WM. CHILDS."

On the tenth February, the plaintiffs commenced the sawing, and delivery of the materials in the bill, to McCourtney, at the place of building the boat, and continued the delivery up to the 12th May, 1842, when they completed it; that during the delivery of the materials, and the building of the boat, Childs was frequently present as a visitor, taking no control or management in the matter; that during the delivery, McCourtney procured one Allen, (who was the clerk of Childs in his steam-mill, situate near the place of delivery,) to measure the lumber, &c., and keep an account thereof, but there was no evidence given, conducing to show that Childs knew this; that the materials, &c., furnished, when thrown into board measure, were worth two dollars per hundred feet, and that McCourtney agreed to pay that price for the same.

It may be unquestionably assumed from the foregoing facts, that the boat, for the building of which the materials were furnished, was to be built by McCourtney, and for his own use; Childs had no agency in the construction of, or interest in the boat. He acted solely in the transaction as the friend of McCourtney. McCourtney made the contract with the plaintiffs, which was conditional on their part. If McCourtney would give them Childs as security, then, they would furnish him with the materials, delivered on the bank of the river, at two dollars per hundred feet. This must have been the terms of the agreement, as there is no evidence of another interview between the plaintiffs and McCourtney, prior to the making out the bill for the materials. The order at the foot of the bill, signed by McCourtney, goes to show that a previous agreement as to price, and place of delivery, had been made between them.

Although Childs appears to have had no interest in the boat, yet he might bind himself jointly with McCourtney, to pay for the materials furnished, by the use of apt words for that purpose. If he had so intended. is it probable he would have used language which he did for that purpose?

Justice Story says, in 7 Cranch, 90, "that the law will subject a man having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for the debt." Words of doubtful import, ought not, it is conceived, to re-

ceive that construction. It is the duty of the individual who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume.

The plaintiff's attorney insists, that the terms used, "I hereby guarantee the payment," &c., are equivalent to saying, "I hereby promise to pay," &c. But we think there is a manifest difference in the force of the language used. The word "*guarantee*," is an undertaking to do an act, or perform a duty for another, in the event of his not performing. Judge Story defines it to be an original collateral undertaking; whereas, the other is a direct, positive and unconditional promise to pay. If Childs had intended to bind himself jointly as principal in the contract, it is remarkable that he used the language which he did. The use of the word *guarantee*, by Childs, satisfies my mind, that he understood its import, and used it understandingly; that he only intended to bind himself to pay, in the event of the plaintiffs being unable to make the amount out of McCourtney. If Childs intended to become jointly bound by his memorandum at the bottom of the bill, why did he not cause McCourtney to sign with him. It will be seen that McCourtney by his note, does not himself expressly promise to pay for the materials furnished for his own boat, and yet it is said, Childs has unconditionally promised to pay for them.

In *Lee v. Dick*, 10 Peters, 492, the following note was addressed by the defendant to the plaintiff:

"Gentlemen: Nightingale and Dexter, of Maury county, Tennessee, wish to draw on you at six, or eight months date. You will please accept their draft for \$2000, and I do hereby guarantee the punctual payment of it. Very respectfully, yr. ob't serv't. SAMUEL B. LEE."

This was held, without any question whatever, to be a guarantee. But substitute the word *promise* for *guarantee*, and no doubt would be entertained of the defendant's direct and positive undertaking, and liability, to pay the \$2000 at maturity.

So in the case of *Mason v. Pritchard*, 2 Camp. 436, where the defendant wrote the plaintiff, "I hereby promise to be responsible to T. M. (the plaintiff,) for any goods he hath, or may supply my brother W. P., to the amount of £100," it was held, that this was a standing or continuing guarantee to the extent of £100, which might at any time become due for goods supplied, until the credit was recalled. In this case the undertaking was more direct, and unequivocal, than in the case now before us. There the extent of liability was fixed; here, there is no specified amount ascertained, or assumed to be paid.

In the case of *Marle vs. Wells*, 2 Cam. 413, the defendant wrote to the plaintiff, "I have been applied to by my brother W. W. to be bound to you for any debts he may contract, not to exceed 100 pounds (with you) for goods necessary in his business as a jeweller; I have wrote to say by this declaration, I consider myself bound to you for any debt he may contract for his business as a jeweller, not exceeding 100 pounds after this date;" it was held, that the defendant was answerable as guarantor for any debt not exceeding 100 pounds, which W. W. might, from time to time, contract with the plaintiff in the way of business.

So likewise in the case of the *Oxford Bank vs. Haynes*, 8 Peck, 423, where, upon the back of the promissory note made by S. & A. to the plaintiff, was written the words, "I guarantee the payment of the within note," and signed by the defendant; it was held, that he was a guarantor, and not a surety.

And in *Dole vs. Young*, 24 Peck, 250, the following writing was signed, and addressed to the plaintiff, by the defendant: "Please send W. goods to the amount of \$100, and I will guarantee the same in four months," and the plaintiff immediately after the presentation thereof, delivered goods to W. It was held that this was strictly a guarantee of the debt of W., and not an original undertaking on the part of the defendant.

These cases, and many others to be found in the books to the same point, go conclusively, we think, to establish the extent of the defendant Childs' undertaking, and make it a guarantee, an original collateral undertaking, and not an unqualified promise, to pay the debt of his co-defendant McCourtney. We are free to admit, however, that there are decisions which militate against the conclusion to which we have come, and some of very high authority; in this conflict we have selected as the rule of our action, those decisions which appear to us to be most consonant with the principles of justice, and as tending in the most eminent degree, to carry into effect the *bona fide* intention of the contracting parties, at the time of the contract. In ascertaining this intention, we have not confined our investigation to a mere technical construction of the writing signed by the defendant Childs, but have taken into consideration all of the attendant circumstances.

It is insisted, however, in argument, that the credit was given by the plaintiffs to Childs, and not to McCourtney, who was a stranger to them; and that therefore Childs is liable as original obligor. In this particular, we cannot distinguish this case from innumerable other cases of guaranties, to be found in the books; and indeed it is in part the object which the guarantor has in view in making the guaranty. If the princi-

pal be sufficiently responsible to obtain the desired credit, upon his own account, there would appear to be no necessity for requiring a guarantee from a third person, having no interest, and deriving no advantage from his undertaking. The fact of a guarantee being given, or required, presupposes a want of credit on the part of the principal, and if the argument be sound to the extent urged, such a relation could scarcely exist between parties. He who undertook, no matter upon what terms, or conditions, if his principal should be irresponsible, to secure the ultimate performance of a contract, would instantly himself be converted into a principal; for, the credit, in whole or in part, would be given upon the responsibility of the guarantor. This would be unreasonable; it would be a harsh rule to apply to one, operated upon by feelings of friendship, and who had, without any pecuniary interest whatever, involved himself for his friend.

It is certainly true, as before remarked, that a man may bind himself to pay the debt of another person, in which he has neither a direct nor a remote pecuniary interest; but in doing so he must not only intend to do it, but he must use appropriate words to bind himself, and the courts will not by a strained construction of his language, subject him to such a penalty. 7 Cranch, 90.

It was also urged in the argument, as a circumstance entitled to consideration, that the bill of materials was made out by Childs. We think there is no importance to be attached to that fact, as McCourtney had an equal right to obtain the services of Childs in aiding him to draw up the bill, as the services of any other individual; and Childs thus lending him the benefit of his superior skill, did not subject himself to any legal liability.

Neither do we think that there is any force in the fact, that the guarantee was made upon the same piece of paper, and at the foot of the bill. There being sufficient space for it to be made there, it was equally as convenient so to make it as upon a distinct piece of paper. Wherever made, it would in no wise change the defendant Childs' liability.

If we have correctly determined the nature of Childs' undertaking, then the doctrine is well settled that before he can be made liable, it was the duty of the plaintiffs to give him notice of their acceptance of his guarantee, and the failure of McCourtney to pay for the materials before they can charge him.

In *Russell vs. Clark*, 7 Cranch. 92, it was distinctly held by the court, that in cases of guaranties it is the duty of the plaintiff to give the defendant immediate notice of the extent of his engagement. In 24 Peck, 250, it was decided that in order to maintain an action against

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a guarantor, a demand of payment must be made in a reasonable time of the principal, and notice of non-payment given to the guarantor; and if in consequence of the want of such reasonable notice, the guarantor is prevented from getting his indemnity of his principal, or otherwise suffers a loss, he shall be exonerated. The same principle was held in the case before cited from 8 Pick. 423. And the reason of this rule appears obvious, as it may be most material, not only as to the guarantor's own responsibility, but as to future rights and proceedings. It may regulate in a great measure his course of conduct and his exercise of vigilance, in regard to the party in whose favor it is given.

In 10th Peters, 496, the court say "there are many cases where the guarantee is of a specific existing demand by a promissory note or other evidence of debt; and such guarantee is given upon the note itself, or with a reference to it, and recognition of it when no notice would be necessary. The guarantor in such cases knows precisely what he guarantees and the extent of his responsibility, and any further notice to him would be useless; 14 John, 349; 20 John. 365. But when the guarantee is prospective, and to attach upon future transactions, and the guarantor uninformed whether his guarantee has been accepted and acted upon or not, the fitness and justice of the rule requiring notice, is supported by considerations that are unanswerable."

The case now under consideration comes fully within the letter and spirit of the rule above laid down. The guarantee is prospective, and the amount indefinite. The only pretext of a notice to Childs, that his guaranty had been accepted, is to be found in the fact that he was frequently at the place of building the boat during the time of its being built and the materials delivered. Whether that would constitute a sufficient notice of the acceptance of his guarantee, and that upon the faith thereof the plaintiffs were delivering the materials for the boat, ought to have been left to the jury. But there was no evidence whatever tending to prove a prior demand of payment, and refusal to pay, on the part of McCourtney, and notice of that demand and refusal given in a reasonable time thereafter to Childs. Proof of such notice is absolutely necessary to charge Childs upon his guarantee, unless the plaintiffs can show that McCourtney was insolvent, and that Childs was apprized of that fact, and consequently sustained no injury by reason of their failure to give him such notice.

Judge NAPTON concurring herein, the judgment of the circuit court is affirmed.

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Scott, J., dissenting.

After evidence had been given, conducing to show that the plaintiffs had given the credit to the defendant, the court instructed the jury that upon the evidence the plaintiffs were not entitled to a verdict. I conceive this instruction to be erroneous. Instead of ascertaining whether there was a guaranty or not, and then applying the law to the case, the court took the fact in dispute for granted, and instructed the jury accordingly. Starkie, speaking in relation to this subject, says, "it is always a question for the jury, whether the credit, before the debt was incurred, was given to the defendant or to another as principal, taking into their consideration the amount of the debt, the situation of the parties, and all the other circumstances of the case." This doctrine of the test is amply sustained by the cases referred to in its support; Keate vs. Temple, 1 Bos. & Pul. 158; Darnell vs. Trott, 2 Car. & P. 82. The word "guaranty" is not a technical one. It does not, *ex vi termini*, import that the party who uses it in contracting, intends that his undertaking shall be collateral. If a note is subscribed by which the maker guaranties the payment of a sum of money to another, would any court construe this a collateral undertaking and not an original promise? This cannot be a collateral undertaking, unless there is an original one; and whether he who undertakes to pay for goods furnished to another, makes himself immediately liable, or only collaterally so, is always a question for the jury.

Even if the undertaking of the defendant should be found to be collateral, I should question the justice or propriety of applying the law relative to guaranties to this case under all its circumstances. Rules of law are of a plastic nature, moulding and adapting themselves to the varying circumstances of the transactions of men, so as to do justice amongst them. Chancellor Kent says, that after a valid guaranty has been made, the rights of the parties in the relative character of principal and surety affords an interesting subject of enquiry, and the doctrine of negotiable paper, as to demand and notice, has a feeble and qualified application to the guarantor. The rule, as to notice, is not so strict as in the case of mere negotiable paper, and the neglect to give notice must have produced some loss or prejudice to the guarantor. The case of Paul vs. Tatlock, 1 B. & P., goes to show that notice to the guarantor, from other sources than the guarantee, will have its influence with the courts. In that case A became bound to B for the honesty of C, who afterwards embezzled the money of B. It was held that B might maintain an action on the guaranty, though three years

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had elapsed without any notice having been given by B to A of the embezzlement; and although it appeared B had given credit to C for the sum embezzled, if it appear that A was acquainted with the circumstances from any other source, and that the embezzlement was not industriously concealed from him. Under the circumstances of this case, the defence is most unconscionable. It is a mockery to talk about notice when the defendant was fully possessed of all the information the plaintiffs could communicate. The defendant was a miller; and his undertaking itself fully apprized him of the extent of his liability. The case of *Wides and others vs. Savage*, 1 Story's Rep. 22, shows that cases of this kind depend very much upon their circumstances.

The presumption that the credit was originally given to McCourtney, arising from the fact that both he and the defendant were jointly sued, is very much weakened by the consideration that the statute allows a plaintiff to sue several in assumpsit, and to recover against one or more as they shall be found indebted.

M. L. PETTIGREW vs. WM. SHIRLEY.

A certificate of pre-emption issued on the 1st June, 1840, under the pre-emption law of 22d June, 1838, will prevail against a certificate of entry made on the 10th April, 1839. The latter entry was subject to the condition, that there was no pre-emption right to the land: And the pre-emption certificate relates back to the 22d June, 1838, and is thus the older right.

APPEAL from Cole Circuit Court.

PEYTON R. HAYDEN, for Appellant.

The plaintiff has assigned for error, the said several opinions of the court excepted to, and he will rely in the argument of his cause in this court, upon the following

POINTS AND AUTHORITIES.

I. That the plaintiff having purchased the land of the United States, and obtained from Uriel Sebree, the receiver of the proper land office, a certificate of such purchase, dated on the 10th day of April, 1839, thereby became entitled to the same, so as to maintain the present ac-

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tion therefor; and that it was not competent for the register and receiver of said land office, on the first day of June, 1840, to sell the same, as the land of the United States, to the defendant, and to grant him a certificate of purchase, so as thereby to invest the defendant with a title sufficient in law to bar the plaintiff's right of recovery; and that the court erred in refusing to give to the jury the first, sixth and seventh instructions as prayed for by the plaintiff, as also in giving the said instruction given as aforesaid upon the motion of said defendant.

See 5 Mo. Rep. *Morton v. Blankenship et al*, 346. 1 Mo. Rep. 398. 1 Peter's Rep. 340. 2d part of Public Land Laws, pages 547, 552. 1 Scammon's Rep. 156, *Bruner v. Manlove*.

2. That the circuit court erred in refusing to give to the jury, the 5th instruction prayed for by the plaintiff. See act of Congress, approved 22d June, 1838, page 84 sheet acts, or at page 574, 1st vol. Land Laws. See 5 Mo. Rep. page 346 (281-'2.)

3. That the circuit court erred, in not setting aside the verdict of the jury, and in refusing a new trial of the cause, for the reasons stated in the motion made therefor by the plaintiff.

STUART & MILLER, for Appellee.

1. The defendant Shirley, will insist, that the court very properly gave the third instruction asked by the defendant, and very properly refused the first, sixth and seventh, asked by the plaintiff.

2. The court very properly overruled the motion for a new trial.

3. That by the statute of Missouri the action of ejectment will lie upon a mere pre-emption right. The pre-emptioner is in no worse condition who has perfected his right, and obtained the certificate from the receiver of the proper land office. See Digest of '35, Title Ejectment page.

That in this case the defendant having proved every fact which was essential to give him a pre-emption, and having proved his pre-emption within the time allowed by the act of Congress, had the better right thereto. See Public Land Laws, part 1st, 574 and 473. See same book part 2d, No. 1011, p. 1026.

That in this case of the plaintiff, it was the duty to have ascertained whether there was any pre-emption right; and when he entered, his entry was subject to be divested by any one entitled to pre-emption. See Land Laws No. 486, page 545. Same book, page 61.

That as the register and receiver had granted to defendant his pre-emption certificate, their decision is final, and cannot be supervised

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by the State courts, and we are bound to presume that every fact necessary to warrant the certificate was proved to the register and receiver.

See *Lewis v. Lewis*, 9 vol. Mo. Rep. 183. *Wilcox v. Jackson*, 13 Peters' p. 517.

That as the legal title to the land in controversy was in the United States, a court of equity could not have afforded the defendant such relief as would have quieted the title; and any proceedings in that court would therefore have been nugatory.

NAPTON, J., delivered the opinion of the court.

Pettigrew brought ejectment against Shirley, to recover the east half of the s. w. qr. of sec. 5, town. 47, range 14. On the trial, the plaintiff produced a certificate from the receiver at the Fayette land office, bearing date the 10th April, 1839, for the land in controversy. The defendant defended on a pre-emption certificate, dated June 1st, 1840, granted by the same officer for the same land, and also proceeded to give proof, conducing to establish his pre-emption under the act of Congress of June 22d, 1838, by virtue of which he had claimed and procured his pre-emption certificate above stated. It appeared that defendant had resided on the quarter section since 1832, the principal part of his farm being on the east half of the quarter, but his garden, out-houses, and half of his dwelling house were on the west half. The plaintiff endeavored to prove that the defendant's location on the west half was accidental, and that he (defendant) supposed his house was on the west half, of which he was the owner. A variety of instructions were asked on both sides. The instruction given by the court at the instance of the defendant, embraces all the points in the case, about which there is any controversy. That instruction was: "If the defendant was a housekeeper, and the head of a family, and actually settled and resided as such upon the land mentioned in the declaration, on the 22d June, 1838, and four months prior thereto, and erected his dwelling house on said land prior to 22d February, 1838, and did not abandon or express his determination to abandon said pre-emption right, but proved his pre-emption and entered the land prior to 22d June, 1840, the defendant is entitled to a verdict. The defendant had a verdict and judgment in the circuit court.

The principal question in this case is, whether a pre-emption right under the act of 22d June, 1838, with a certificate thereon issued on the 1st June, 1840, will protect a defendant in ejectment against an entry of the same land on the 10th April, 1839.

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Our statute permits an action of ejectment to be maintained on "a pre-emption right under the laws of the United States." This has been the law of this State since 1825, and the language of the act of 1835 is precisely the same as that employed by the act of 1825. When the act of 1825 was passed, in which this pre-emption right was first spoken of, there was no law of the United States, that I am aware of, recognizing any pre-emption right except such as was proved up before the register and receiver, and no pre-emption right whatever existed upon lands which had been in market. The pre-emption law of April 12, 1814, which continued in force with various modifications until 1830, required the settler to file his notice with the register two weeks prior to the public sales, and proof of the pre-emption was required to be satisfactory to the register and receiver. This was the character of pre-emption right declared by our law of 1825 to be sufficient to maintain an ejectment.

In 1830, (May 29) a new species of pre-emptioners is recognized by Congress. The proof of the pre-emption was still required to be made to the satisfaction of the register and receiver, but the time of making the proof was construed to extend to the time fixed for the expiration of the law, and the lands to be affected by it were construed to be lands which had been in market for years, as well as those which had never been offered for sale. The provisions of this act were continued from time to time until the final expiration of the act of June 22, 1838.

Under this series of pre-emption laws, a right of pre-emption was recognized by the laws of the United States, no evidence of which was to be found in the land office, nor could it be ascertained whether such right to a preference in the purchase of the land would ever be claimed by the pre-emptor, and perfected into a purchase. The question has then arisen whether such a pre-emption right as this is within the meaning of our statute, and will enable the pre-emptor to maintain or defend an action of ejectment. In *Lewis v. Lewis*, the judge who delivered the opinion of the court, intimated that such a pre-emption right would be sufficient to defeat an entry of the same land made previous to the expiration of the time allowed the pre-emptor to prove up his pre-emption. But the question did not arise in that case—nor does it arise here, for the pre-emption of Shirley had been proved and allowed before any suit was instituted by Pettigrew. The question is merely alluded to as it was discussed at the bar, and about which I mean to give no opinion in this case. Indeed I cannot perceive its importance, except in a case where the time for proving the pre-emption has expired; and no proof has been made, but only tendered

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or offered to be made within the time. In such a case, the propriety of allowing the pre-emption to defeat a purchase of the same land by entry, may be a question of importance. I entirely concur with the judge who delivered the opinion of the court in *Lewis vs. Lewis*, that a pre-emptor under the act of 1830 or 1838, could not be ousted by an ejectment before the expiration of the time allowed him by law, for proving up his pre-emption; because the existence of his pre-emption, and the fact that the period had not arrived when he was bound to prove it, would show the purchase of the plaintiff to be illegal. But if the time for proving the pre-emption has actually expired, and no proof has in fact been made, though the pre-emptor offered to prove it, and the officers of government illegally refused to permit the proof, what title then has he upon which he can maintain his ejectment?

I recur to the main question in this case, the propriety of the action of the circuit court in allowing the pre-emption of Shirley, proved up on the 1st of June, 1840, to prevail over the entry of Pettigrew on the 10th April, 1839.

The act of June 22, 1838, continues in force the provisions of the act of May 29, 1830. This last act requires the proof of settlement and improvement to be made to the satisfaction of the register and receiver of the land district, and declares all assignments and transfers of the right, null and void. The fourth section provides that the act shall not delay the sale of the public lands beyond the time appointed for that purpose by the President's proclamation, and that the provisions of the act shall not be available to any one who fails to make the proof and payment required before the day appointed for the commencement of the sales of lands including the tract or tracts on which the pre-emption is claimed. The construction given to this act shortly after its passage, and down to the expiration of the law of 1838, was that its provisions were applicable to all the public lands, except such as were specially exempted in terms by the act, whether it had been previously in market or not. The effect of this construction was to produce an implied reservation from sale for the period fixed by the act, of all lands upon which a pre-emption right existed. The officers of government to whom the management of these sales was confided under instructions from the chief of the land department, accordingly refused to permit entries to be made of such lands, and as it was not always easy to determine the fact upon which their duty and power might depend in every case, they were instructed to permit entries and give certificates of sale, upon the express condition that if a pre-emption right on the land sold, was proved before the expiration of the

time allowed by law for such proof, they would return the purchase money without interest and vacate the certificate. This was the uniform construction given to the act of 1830, by the commissioner of the land office, and to this construction the action of the subordinate officers of the department was ultimately conformed. Not only did this construction receive the sanction of the officers of the government more immediately concerned in the disposition of the sales of the public lands, but Congress with a knowledge of such construction, from time to time re-enacted the essential provisions of this law, until 1838. Under this state of facts, the question would seem to be no longer open. Whatever views might be entertained by this court in relation to the propriety of the construction of the act of 1830, and the acts which succeeded it, on the subject of pre-emptions, which allowed pre-emptions on lands subject to private entry, we are not at liberty to dispute that construction of the law which has been sanctioned by Congress and acquiesced in by the public. This view of the case seems to have been taken by the supreme court of Indiana, in the case of *Smith vs. Mosier*, (5 Blackford 51) and by the supreme court of Illinois, in the case of *Isaacs vs. Steel*, and *Bruner vs. Manlove*, (3 Scammon 97 and 340.)

The entry of Pettigrew in April, 1839, was then made subject to be avoided by the grant of pre-emption to Shirley at any time prior to the 22d June, 1840. The effect of the act is to protect the pre-emptioner from the date of its passage. His title then commences, and is the older and better title, than an entry of the land previous to the date of his certificate. His pre-emption certificate relates back to the date of the act, and avoids all intermediate sales. This results from the construction given to the act of 1838. The commissioner of the general land office attempted to reconcile the right of the pre-emptors with the right of private entry, and the only way this could be done, was to make the private entries *conditional*. It is not for us to object to these conditional and avoidable sales. The government has sanctioned them and however inconvenient and inconsistent with the general laws of Congress on this subject, such an enactment may seem, the intent and purpose of the law must be carried out.

Under this construction of the pre-emption law, of 1838, I can perceive no necessity for driving the pre-emptor into a court of chancery. The defence is purely legal; his title is as much a legal one, as that of the purchaser at private entry—neither are consummate, but each is recognized by our statute.

In relation to the question of abandonment, as that question was

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submitted to the jury by the instruction of the circuit court, whether it was material or not, the plaintiff in error has no cause for complaint. The jury negatived the fact of abandonment by their verdict.

The other Judges concurring with me in affirming the judgment of the circuit court, it will be accordingly affirmed.

THE STATE vs. BLACK.

An indictment against a person for trading with Indians, must aver that the Indians had not a written permit from their proper agent.

ERROR to Jasper Circuit Court.

McBRIDE, J., delivered the opinion of the court.

The defendant was indicted at the April term, 1844, of the Jasper circuit court, for selling spirituous liquors to Indians.

The indictment contains three counts. At the October term, 1844, the defendant by his attorney, filed his motion to quash the indictment, "because it does not appear on the face of the indictment, that the Indians to whom the spirituous liquors were sold, had no permit from the agent," &c. The circuit court sustained the motion and quashed the indictment, to which the circuit attorney excepted, and sued out a writ of error from this court.

The question raised by the record, is the action of the circuit court in quashing the indictment for the cause assigned. The indictment contains no averment or charge that the Indians had not a written or other permit from the proper agent.

By the provisions of the first section of "an act to suppress intercourse with Indians," approved February 9, 1839, it is declared unlawful "For any person or persons to trade or traffic or barter with any Indian or Indians, either by selling, trading or exchanging them any spirituous liquors, &c., unless such Indians shall be traveling through the State, and have a written permit from the proper agent, or under the direction of the proper agent, in person."

Should the indictment negative the existence of a written permit from the proper agent of the Indians to whom the spirituous liquors are charged to have been sold?

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Whether under a public or private statute, the indictment should state all the circumstances which constitute the definition of the offence in the act, so as to bring the defendant precisely within it; and must with certainty and precision charge him with having committed or omitted the acts constituting the offence, under the circumstances, and with the intent mentioned in the statute. And if there be any exception contained in the same clause of the act which creates the offence the indictment must show, negatively, that the defendant, or the subject of the indictment, does not come within the exception. But if the exception be in a subsequent clause or statute, it is properly matter of defence for the defendant, and need not be negatived in the indictment. Barbour's Crim. Treatise, 290-1; Arch. C. P. 53, and the authors there cited.

Applying the foregoing principles to the indictment under consideration, we are of opinion it is bad for the omission of a negative averment, that the Indians to whom the spirituous liquors were sold, had not a written permit from the proper agent, or that the sale did not take place under the direction of the proper agent in person; and that the circuit court committed no error in quashing the indictment.

The judgment of the circuit court is therefore affirmed.

HOWE vs. THE STATE.

No appeal will lie from the refusal of a circuit court to discharge a prisoner, on a writ of *habeas corpus*.

APPEAL from Washington Circuit Court.

McBRIDE, J., delivered the opinion of the court.

Thomas W. Howe was summoned to appear before a justice of the peace of Washington county, to testify in a cause then and there pending before the justice; he appeared but refused to be sworn, because he said he had in his possession a letter of attorney constituting him an attorney for the defendant; which letter he threw down on the table before the justice; the justice decided that he must be sworn, and upon his refusal committed to jail as for a contempt. The circuit court being then in session, Howe applied for and obtained from the court a writ

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of *habeas corpus*; the circuit court, after hearing his application, refused to discharge him, and remanded him to jail. From the decision of the circuit court in refusing to discharge him, Howe appealed to this court.

We know of no provision in the constitution of this State, if it be there, nor in the statute laws, if it be there, under which the defendant asks this court to review the decision of the circuit court in the premises. The judges of this court, in common with the circuit judges and the justices of the several county courts, have power to grant writs of *habeas corpus*, and discharge persons who are illegally restrained of their liberty; and whether done by one or the other, is equally efficacious. If a judge of this court were to refuse to discharge a prisoner, on a writ of *habeas corpus*, the prisoner might on the next day make his application to a circuit judge or justice of a county court, for a writ, and be discharged by them, if entitled to his discharge by the laws of the land, without subjecting the officer discharging him, to a proceeding for a contempt. The refusal to grant a discharge, is not a final judgment from which an appeal will lie to this court. Suppose the application were made in vacation, to an officer empowered by law to grant the writ, and after hearing the evidence or inspection of the record, he should refuse to discharge the prisoner, how would an appeal be taken from that decision? And yet the several judges and justices, who are vested with the power, possess the very same jurisdiction in vacation, as in term time. The only appeal which the party has from a decision of the judge or court in refusing to discharge him, is to another judge or court, who may regard his application more favorably; and this is to be done in the character of an original application, and not in the exercise of appellate power.

The other Judges concurring herein, the appeal is dismissed at appellant's costs.

JEFFERSON CITY vs. C. & F. COURTMIRE.

1. The clause in the charter of Jefferson City which gives to the mayor and board of aldermen, power to "*regulate the police of the city*," gives them no power to pass an ordinance for the punishment of indictable offences.
2. By the charter, the aldermen have the same criminal jurisdiction as is possessed by justices of the peace under the general law.

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[ERROR to Cole Circuit Court.]

McBRIDE, J. delivered the opinion of the court.

This was a proceeding instituted against the defendants, by the corporate authorities of the city of Jefferson, on a charge of having committed a breach of an ordinance of said city, for the suppression of riots, routs and unlawful assemblies. The trial was had before an alderman of said city by a jury of six men, by consent, who found the defendants guilty, and assessed a fine against them, upon which judgment was entered; thereupon the defendants took an appeal to the circuit court, and there filed their motion to dismiss the case; which having been sustained, the corporation excepted, and sued out a writ of error to reverse the judgment of the circuit court.

The power exercised by the alderman in this case is claimed for him by virtue of the provisions of the ordinance above referred to, and is said to be within the rights vested in the corporate authorities by the charter granted them by the general assembly of this State. See an ordinance passed by the board of aldermen, May 7, 1839, entitled "an ordinance to suppress riots, routs, and unlawful assemblies;" also, the charter of the City of Jefferson, passed at the session of 1839-40, page 307, § 7, 12.

The fourth section of the ordinance vests in the mayor, any alderman, or justice of the peace, of the city, the jurisdiction claimed in this case. The seventh section of the act of incorporation provides that, "The aldermen shall be ex-officio conservators of the peace throughout the city, and shall within the same, have all the powers and jurisdiction vested in justices of the peace in matters of a criminal nature, and shall exercise and perform all powers and duties which may be vested in, or required of them by ordinance." The powers and jurisdiction of justices of the peace, referred to in the foregoing section, must mean those conferred by the general law of the land, and not such as might be given by ordinance. This is obvious, for no new or enlarged power had been conferred on the justices of the peace residing within the corporate limits, by the act of incorporation, nor any authority conferred on the mayor and board of aldermen to enlarge their jurisdiction. What jurisdiction then, under the general law, have justices of the peace over the offence charged against the defendants? An answer to this question will determine the jurisdiction of the mayor and board of aldermen; for, by the same act, the same jurisdiction, and no other, is given to them.

Riots, routs and unlawful assemblies are, by the 7th section of the act

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concerning crimes and punishments, R. C. 202, made indictable, and are punished by fine and imprisonment in the county jail. However, the doctrine may be settled, as to the power of the general assembly to prescribe a summary mode of punishment, for offences likewise made indictable, is not now important to inquire, as there is no pretext that any such provision in reference to this offence exists on the statute book. It is manifest, then, that justices of the peace have not jurisdiction to try and punish this class of offences.

But it is contended that the 12th section of the act of incorporation, which enumerates the powers and jurisdiction of the mayor and board of aldermen, confers the power of enacting the ordinance in question. After a minute and specific enumeration of powers conferred, we find the general one, "To regulate the police of the city;" and for a definition thereof, we are referred to Webster's Dictionary, and Tomlin's Law Dictionary, title, Police. Whatever may be the definition of the word in its most enlarged, and comprehensive sense, we are not disposed to give it that universal signification on the present occasion. Such a construction would abridge the rights secured to the citizen by the constitution; it would confer on the corporate authorities legislative powers, co-extensive with those given to the general assembly of the State. If under this general, undefined, and undefinable power, "to regulate the police of the city," the corporate authority can punish summarily, for the offence here charged, by what rule can their power be limited to punish offenders for grand larceny, manslaughter, murder, or any other felony? Neither is there any necessity for giving to the corporation any such power; for by reference to the 12th section, it will be seen that the enumeration of powers therein named, embraces every object which by possibility may conduce to the interest of the city to regulate, without encroaching upon the province of the legislature, or abridging the rights of the citizens.

The circuit court committed no error in dismissing the case, and Judge NAPTON concurring herein, the judgment of the circuit court is affirmed.

SCOTT, J., dissents.

STATE OF MISSOURI vs. MOLES, IMPEADED WITH FORSYTH.

A prosecutor is not necessary on an indictment upon the 15th section, 7th article, act concerning crimes and punishments, R. C. 1835, for disturbing the peace of a family by loud noises, &c., in the night—that not being a trespass either to the person or property of any one.

The State vs. Moles, impleaded with Forsyth.

APPEAL from Franklin Circuit Court.

McBRIDE, J., delivered the opinion of the Court.

Moles was indicted at the April term, 1844, of the Franklin circuit court, for disturbing a family in the night time. The defendant appeared by his attorney, and moved the court to quash the indictment, because "the name of a prosecutor is not endorsed on said indictment; neither does it appear from any statement made at the end of the indictment, that said indictment was preferred upon the information or knowledge of two or more of the grand jury, or on the information of some public officer in the necessary discharge of his duty." The court sustained the motion, and the State appealed to this court.

This indictment is founded upon the 15th sec., VII art. of "an act concerning crimes and their punishment," R. C. 204, which provides that "if any person or persons shall, in the night time, wilfully disturb the peace of any neighborhood, or of any family, by loud and unusual noise, loud and offensive or indecent conversation, or by threatening, quarrelling, challenging, or fighting, every person so offending shall, upon conviction, be adjudged guilty of a misdemeanor, and be punished," &c.

The motion of the defendant is based on the 22d sec., III art. of "an act to regulate proceedings in criminal cases," R. C. 481, which provides that "no indictment for any trespass against the person or property of another, not amounting to a felony, shall be preferred, unless the name of a prosecutor is endorsed as such thereon, except where the same is preferred upon the information or knowledge of two or more of the grand jury, or on the information of some public officer, in the necessary discharge of his duty; in which case a statement of the fact shall be made at the end of the indictment, and signed by the foreman of the grand jury."

It is supposed that the question presented in this case, was decided by this court in the case of the State vs. McCourtney and others, 6 Mo. Rep. 649; but by a careful examination of that case, it will be found that instead of sustaining the action of the circuit court in quashing the indictment, it shows that there is no necessity for a prosecutor to be endorsed thereon. That was an indictment charging the defendants under the 6th section of the 3rd article of the act first referred to, with having unlawfully, riotously and routously, made an assault and beat one James Pepper, &c.; and the court say "this is nothing more nor less than a common law riot, of which three kinds are specified :

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"1. Unlawful and forcible acts against the person or property of another. 2. Unlawful and violent acts against the peace merely. 3. Such acts committed to the terror of the people." If these two last species can exist without the first, then there might be an indictment for a riot, which would not come within the terms of the 22d section of the third article of the act concerning practice and proceedings in criminal cases."

If the charge in the indictment constitutes a trespass against the person or property of another, then the party aggrieved is entitled to his civil action against the defendant, for the damages he may have sustained by reason of such trespass. But I apprehend that in this case it would be extremely difficult for the party aggrieved, to maintain such action. The charge in the indictment is that the defendants, in the night time, by loud and offensive cursing, and profane swearing, threatening and quarreling with, and challenging to fight one Gideon Eastwood, in the presence and hearing of the family of William Eastwood, their peace and quiet was disturbed," &c. No trespass on the person or property of William Eastwood, or his family, is embraced in this charge, as was charged in the indictment against McCourtney and others, who were clearly liable to an action by Pepper.

We think the circuit court committed error in quashing the indictment.

The other Judges concurring herein, its judgment is therefore reversed, and the cause remanded for further proceedings in that court.

ROSS vs. THE STATE OF MISSOURI.

1. Where a defendant demurs to an indictment, and his demurrer is overruled, the court cannot enter up judgment against him, and assess his punishment—a plea should have been put in, and a trial had by a jury.
2. In criminal cases a demurrer is not considered as a confession of guilt.

ERROR to Platte Circuit Court.

McBRIDE, J., delivered the opinion of the court.

The defendant was indicted at the March term, 1842, of the Platte circuit court, for a violation of the dram shop law. At the July term

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the defendant appeared by his attorney and filed his demurrer to the indictment, which having been overruled by the court, the court proceeded to assess the fine, and enter judgment against the defendant.

The question presented on the record in this case has heretofore been decided by this court; that is, whether it is proper in a criminal case, where the defendant demurs to the indictment, and his demurrer is overruled, for the court to assess the fine, and enter judgment thereon.

In *Thomas vs. the State*, 6 Mo. R. 457, the court say, "but the statute directs that in all cases where the defendant does not confess the indictment to be true, a plea of not guilty shall be entered, and the same proceedings shall be had, as if the defendant had formally pleaded not guilty to such indictment."

"The law never contemplated that a man charged criminally, means to confess the indictment to be true when he demurs; even in civil cases the defendant who has a demurrer decided against him, is allowed to withdraw his demurrer and plead. A jury should have been empanelled to find whether the defendant was or was not guilty."

The judgment of the circuit court is reversed, and the cause remanded for further proceedings therein.

COCKRILL vs. KIRKPATRICK.

1. A note payable "*in the currency of this State*," is payable either in gold or silver coin, or in the notes of the Bank of Missouri.
2. A note payable "*in the current money of Missouri*," is payable in gold or silver coin alone.
3. Where a note is made payable "*in the currency of the State*," it is not competent to shew by parol testimony, that it was understood by the parties to mean any other than gold and silver, or notes of the Missouri Bank.
4. The contents of a written instrument cannot be proven until the loss or destruction of the instrument is proven.
5. A principal cannot maintain an action against an agent for money collected by him until a demand is made.
6. Whether a demand has been made is a question for the jury. It may be shewn by circumstances.
7. Although a tender be made and refused, the plaintiff is entitled to recover his debt. The tender prevents the interest from running, and if the money be brought into court will save costs.

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9. A tender need not be made in constitutional coin, but will be good in bank notes, unless objected to for that reason. If, however, the notes be depreciated, the refusal to accept will be presumed for that reason.

ERROR to Randolph Circuit Court.

DAVID TODD, for Plaintiff.

The plaintiff insists upon these points to reverse the judgment:

1. That evidence to prove witness' understanding of the legal effects of a contract, to be different from the substantial contents of an absent contract, is illegal and incompetent; 7 Mo. Rep. 515.

2. If defendant has collected money for plaintiff, and a demand is made, and no payment, a recovery can be had, and for interest from refusal.

3. A demand may be inferred, and is not to be proven in express terms.

4. When money is tendered and not received, upon suit the plaintiff can recover the principal, and unless the money is in court upon the plea of tender, and there paid over, judgment must go for the plaintiff; 13 Wend. 390.

5. That if a note is payable in currency at a particular day, and is not paid on that day by the payor, and it is his duty to seek the creditor for that purpose, he is not permitted subsequently to pay it in such currency without the consent of payee.

6. A plea of tender made of such currency after such day of payment is not good.

JOHN B. CLARK, for Defendant.

The defendant in error relies upon the following points and authorities to sustain the decision of the circuit court:

1. The defendant in this case was but the agent of the plaintiff in the collection of the money in the note, and had a right to collect the same in the kind of currency contracted to be taken by the plaintiff, although nothing was said in the note about the kind of money agreed to be paid and received in discharge; yet if there was an agreement to take currency, and the agent received the same kind of money agreed to be taken by the principal, he is bound to receive the same from the agent; Theobald on Agency, 356.

2. In this case the plaintiff has no right of action until he makes a

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demand of the agent to account. This principle has been decided by this court in the cases of Benton vs. Craig, 2 Mo. Rep. 160; Burton vs. Collier, 3 Mo. Rep. 223.

3. There being no special instructions to the agent in this case, and he having transacted the business of his principal in the usual manner observed in the country at that time, the principal was bound and the agent absolved from any liability, although a loss ensued; Theobald on Agency, 356 and 357.

McBRIDE, J., delivered the opinion of the court.

Cockrill brought his action before a justice of the peace in Randolph county, against Kirkpatrick, for money collected by the defendant for the plaintiff, where the defendant obtained judgment; from which the plaintiff appealed to the circuit court, where the defendant again having judgment, the defendant sued out his writ of error and has brought his case to this court.

The following is the evidence, as preserved by the bill of exceptions, to-wit: R. Denson testified that he was indebted to Noble on a note: that said note was assigned by Noble to the plaintiff: that above two years ago he paid the amount, \$30 12 1-2, to the defendant, who had said note for collection: that he paid said note in Illinois bank paper, except 12 1-2 cents which he paid in specie: that it was paid in notes on the Springfield or Shawneetown Bank. His note to Noble was payable in the currency of this State: that it was his understanding that the note was to be paid in the common currency of the country, and that Springfield, Shawneetown, Indiana, &c., bank paper, was at that time the common currency of the country, but that there was more Illinois paper than any other kind.

N. Coates testified, that about January, 1842, he was doing business in Cockrill's store in Huntsville, when defendant came there and said to plaintiff, I have collected or have got your money from Denson: plaintiff said very well, or I am glad of it: that witness then went into another room, and in a few minutes after, on his return, heard plaintiff say to defendant, I will not pay any such price or any such charges: that he understood this to be in relation to a charge which defendant made for collecting the money: that the parties separated: he did not see or hear defendant offer plaintiff any money, nor did he see defendant have any.

J. R. Abernathy testified, that Springfield bank paper sunk greatly below par, and ceased to circulate generally in the month of February,

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1842: that previous to that time the money in circulation was principally Illinois, Kentucky, &c.

Thereupon the plaintiff asked the court to instruct the jury as follows:

1. That if they believe from the evidence that the defendant collected \$30 12 1-2 of the plaintiff's money, and that the plaintiff informed the defendant that he was ready to receive it, or demanded it, or done any act equivalent to a demand, they will find for the plaintiff, unless they also find that the defendant has since that time, and before the bringing of this suit, paid or tendered to the plaintiff the said money.

2. That it is not necessary that a demand should be proven positively, but the jury may infer a demand from the circumstances in the case.

3. That circumstances are sufficient to make out a demand.

4. That although the defendant is entitled to a reasonable compensation for collecting the plaintiff's money, yet it was his duty to pay all the money, over and above what would pay him such compensation, for his trouble, and labor, and time.

5. That "*currency of Missouri*" only means such money as is issued or received by authority of the laws of Missouri or of the United States.

6. That it is not competent for a party to a written contract, or others, to prove that the contract was different from the terms thereof unless fraud or mistake is proven.

7. That currency, or current Bank paper, may mean such bank paper as is in general circulation, but currency of the United States, or of the State of Missouri, should be construed such currency as is authorized by the laws of the United States or of the State of Missouri.

8. That if the jury find for the plaintiff, they may find interest on the money from the time the same ought to have been paid.

9. That a tender of money is the actual production, and offer to pay the money, or a declaration made by the party to whom the money is to be paid, that he will not receive it.

10. That the offer of money in gross, or in a bag, does not make a tender; but it must be counted out, or the proper amount offered without demanding change, unless the party to whom the money was to be paid, declared that he would not receive it.

11. If a tender in bank bills is refused, and the bills are uncurrent, or under par at the time, the jury may infer from that fact that their uncurrency, or deficiency in value, was the cause of objection.

12. That a tender only bars the plaintiff from recovering costs, but he is entitled to recover the amount due.

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The 2, 4, 6, 9, 10, 11 and 12 were given; the 1, 5 and 7 refused; whilst the 3 and 8 appear not to have been acted upon by the court.

The defendant then asked the following instructions to the jury.

1. If the jury believe the contract was made for such money as was current at the time when the same was due, the defendant had a right to collect the same in currency.

2. If the jury believe there was a tender of the money due, before the institution of the suit, and that the plaintiff refused to receive it, they will find for the defendant.

3. That the plaintiff in this case cannot recover, unless he or his agent made a demand of the defendant for the money before the suit was brought.

4. That if the jury believe a demand was made, yet if they believe the money was collected in the kind of money agreed to be paid, and that the defendant offered the same, and that the plaintiff refused to receive it when demanded, and after the defendant had offered to pay, deducting a reasonable compensation for collecting the same, they will find for the defendant.

5. A tender in bank bills or notes, is a good tender, unless specially objected to on that account at the time.

6. A tender and refusal to receive may be inferred from circumstances.

All of which were given by the court except the sixth, which appears not to have been acted upon.

The record then proceeds, "Denson was then again called before the jury, and in the main said, that he thought said note read "current money of Missouri," but he was not certain."

The jury having found a verdict for the defendant, the plaintiff filed his motion to set aside the verdict and for a new trial, &c., which having been overruled, he excepted to the opinion of the court.

Without undertaking to examine the instructions in detail, we shall investigate two or three points arising out of the case, as we believe a decision of those will decide the whole of the instructions.

If it be admitted that the note from Denson to Noble was payable "*in the currency of this State*," then we shall not have much difficulty in ascertaining what are the legal rights of the parties. These terms import either, first, gold or silver coin, which is the constitutional currency of the United States, the "tender money" of the several States of the Union; or, second, the notes of the bank of the State of Missouri, the issuing of which is authorized by the laws of this State, and cannot by any fair construction be made to mean the notes of the several banks

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incorporated by the laws of other States, which for the time being may have been in circulation in this State.

But if the note was "payable in the current money of Missouri," as the obligor subsequently stated, then all necessity for construction is absolutely excluded, for the terms explain themselves, and can only mean "tender money," gold or silver coin. And this, too, without invoking the aid of the principle, that the language in an obligation is to be taken most strongly against the maker thereof.

The courts of Kentucky have had much difficulty in construing contracts of the description of the one now under consideration. In the case of *Chambers vs. George*, 5 Litt. 335, where the obligor undertook to pay a certain sum of money, "payable in the currency of the State," it was held not to be a direct promise to pay money. Then in the case of *Lampton vs. Haggard*, 3 Mon. 149, where the note sued on was for \$350, "Kentucky currency," the court say, "that although the bank of Kentucky was in operation, it paid specie for its notes, and continued to do so for some time after the date of the note, hence the term used could only mean gold or silver." And in referring to the case of *Chambers vs. George*, the court say, "that the note in that case was given after the suspension of specie payments by the Bank of Kentucky, and the non payment of specie by other banks, subsequently established, had caused a paper circulating medium which, in popular acceptance, became emphatically the 'currency of Kentucky.'"

Again in the case of *McCord vs. Ford*, 3 Mon. 166, an action was brought on a note promising to pay \$700, "current money of Kentucky," and it was held, that this was a direct promise to pay, and the terms used do not import the same as in the case of *Chambers vs. George*, but mean that kind of money made current by an act of Congress, which is the only current money of Kentucky. The court in the case of *Bainbridge vs. Owen*, 2 J. J. Marsh. 463, interpret "current money" to mean constitutional coin.

From the foregoing cases we glean the fact, that the meaning of such restrictive or qualifying terms, depend upon the varying circumstances of the country. Whilst the banks in Kentucky redeemed their notes in gold and silver, the expressions amounted to nothing, they were imperative; but so soon as the banks suspended, then the parties were presumed to contract for the irredeemable paper currency of the State. Our bank, however, has not been forced into a position so humiliating, and our courts have not yet been driven to such extremities in endeavoring to satisfy the exigencies of the public on the one hand, and a faithful discharge of their duty on the other.

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The only case decided by this court, which has been referred to, is the case in 7 Mo. R. 595, where the obligor promised to pay \$2000 "in currency," and the court held the writing not to be a bill of exchange within the meaning of our statute concerning bills of exchange; and moreover that the obligee could only recover the value of currency at the falling due of the note.

If the note in question be, as is contended for, payable in the bank paper of Illinois, Kentucky, Indiana, Virginia, and Missouri, which constituted the principal paper circulation at the date of the contract, whose right would it be to designate in which of the various descriptions of paper the payment should be made? This would become an enquiry of some moment to the parties, because the relative value of the notes of the enumerated banks, might vary from five to twenty per cent. If Illinois, Indiana, Kentucky and Virginia bank paper constituted the "currency of this State," or "the current money of Missouri," then we concede that the payment in Illinois bank paper was a good payment; but if the paper circulation of the Missouri bank, and gold and silver, constituted "the currency of this State," or "the current money of Missouri," then the obligor was bound for such paper and coin; and a payment in any other description of bank paper was not in conformity with the terms of the contract. We have no hesitation or difficulty in declaring that the undertaking in this case was to pay Missouri bank paper, which was by law made the paper "currency of this State," or gold or silver coin, which by the constitution of the United States, constitutes the "current money of Missouri," as well as of all the other States in the confederacy.

But the defendant's counsel contends that even if the note should be construed to mean what the plaintiff insists it does mean, yet the defendant, as the agent of the plaintiff, had a right to go behind the note, and receive payment in that description of currency, contracted for by the original parties, and refers to Theobald on Agency, 356, for authority. It is there said, "neither is an agent chargeable for a breach of his instructions, if the compliance would have been a fraud upon others," (Burwell vs. Christie, Cowp. 395.) The technical answer to this, and the like cases, is, that the court will not permit a plaintiff to allege his own fraud. Thus an agent was employed to sell certain articles, and the condition of the sale purported that the highest bidder should be the purchaser; but the agent had private instructions not to sell under a certain sum; notwithstanding which, he sold for the highest sum bid, though less than the sum prescribed; and upon an action brought against him by his employer, he had judgment in his favor, since he could not

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have obeyed his instructions without practicing a fraud upon the bidders. But it would have been otherwise if the direction had been to set the article up at the price mentioned, since no fraud could have ensued from that circumstance. *Howard vs. Christie*, 6 T. R. 347.

We do not think this principle applicable to the case now before us, for if the point be conceded that the note from its terms was payable in Missouri bank paper, or gold and silver coin, then there is no principle of law by which the obligor would have a right to go behind the note, to show that it was payable in a currency less valuable; and a contrary doctrine, in cases like this, would be most monstrous and mischievous. Here the obligor executes an instrument of writing, by which he binds himself to pay a certain sum of money in a way therein specified, at a day named; which writing is made assignable by law; and after assignment, when it falls into the hands of an individual who looks to the face of the instrument for the extent and character of the obligation, the obligor claims that although he has bound himself to pay the debt in the constitutional currency, yet it was his understanding that it was to be paid in irredeemable and worthless bank paper. And the agent of the assignee goes behind the written contract, and receives from the obligor, a discharge in this worthless paper currency, and when his principal demands payment, he says, I have done what in equity you ought to have done, and the law will hold me faultless. The fraud if any there be in the transaction, is surely not chargeable against the assignee of the note.

The defendant had no right to prove the contents of the note without first showing its loss, or destruction, or otherwise accounting for its absence. From any thing that appears in the evidence, the maker of the note may have had it in his pocket, when he was testifying to its contents; and if so, it should have been produced, it being the best evidence; but in this case the non-production of the note is not very important, inasmuch as the evidence of the witness does not qualify its legal import.

We are of opinion that before a principal can maintain an action against his agent for money received or collected by him for his principal, that a demand should be made. What constitutes a demand, is a question for the jury to decide, and in making their decision they are to take into consideration all of the attendant circumstances.

Tender is an offer to perform a contract, or to pay money, coupled with a present ability to do the act; and all the instructions about a sum in gross, and money in a bag, are outside of this case, for there is no evidence whatever upon which to predicate such an instruction. Ten-

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der, like a demand, may be proven by circumstances, and need not be established by direct, positive, and unequivocal evidence. When established, it prevents the running of interest, and may save costs when the money is brought into court, and deposited, but the plaintiff is, notwithstanding, entitled to his judgment for his debt, as the tender is not a satisfaction of the debt due. The tender need not be in constitutional coin, but is good in bank paper, unless objected to on that account at the time; if made in depreciated bank notes, the refusal to accept, may be presumed to arise from the fact of such depreciation.

From the foregoing views, it results that the circuit court erred, and the other members of the court concurring herein, the judgment of the circuit court is reversed, and the cause remanded for a new trial.

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1. What is said by those holding an instrument of writing, at the time of soliciting, or permitting persons to sign the instrument, is evidence of its contents.
2. When a trial has commenced, and witnesses have been examined, it is a matter of discretion with the court, to refuse or permit a party to give a new bond for costs, with a view to cancel the old bond, and to use a security thereto as a witness.
3. The law presumes an erasure, or interlineation to have been made before signing an instrument, unless the instrument be suspicious upon its face. If it will be so considered by the court, no presumption is raised, but the question is to be submitted to a jury.

APPEAL from Randolph Circuit Court.

Todd, for Appellant.

The appellant insists upon the reversal of the judgment below, upon the following points:

1st. The *onus probandi*, lies upon the defendant pleading an erasure in his agreement sued upon after signature, to prove it, for the presumption of law is, that such erasure was made before signing, and being an *alteration* only, made by a stranger, does not avoid it.

2d. That the declaration of persons in possession of the writing sued on, made out of the presence of the party to be charged, is no part of the *res gestæ*, is hearsay, and illegal evidence.

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3d. That all testimony given by witnesses hearing others read a writing, without inspection themselves, is not competent evidence to prove what the instrument contained, and what erasure was in it.

4th. That the positive evidence of the witness Estis, who wrote the instrument, that he made the erasure before signing, and at the time of writing, with the other circumstantial evidence, and that witness not impeached in credit, is such conclusive evidence in favor of the validity of the writing, as to show the verdict is clearly against the weight of evidence, and that they were influenced by prejudice, and led away by the illegal instructions of the court.

5th. That a party has a right to release a security for costs, by giving other competent security in his place, so as to obtain his testimony; the execution of such a bond need not be proved, unless required by the opposite party.

6th. The deposition of a witness *de bene esse*, cannot be read by a party, unless he proves the inability of the witness to attend, or his residence beyond sixty miles of the place of trial; for this reason Halley's deposition should have been rejected.

CLARK, for Appellee.

The counsel for the appellee makes the following points, and relies upon the following authorities to sustain the opinion of the circuit court:

1st. It is clear that the article of agreement set out in the bill of exceptions, is the basis of the plaintiff's right of action, and that the obligation of the defendant to pay the plaintiff anything, was created by that agreement, and nothing else.

2d. That the contract of the parties being in writing, we must look to that alone for their will, and the extent of their respective obligations; and if the instrument of writing containing the contract was altered in any material particular, subsequent to its execution, by erasure, or otherwise, without the consent of the defendant, such alteration rendered the same void as against the party not consenting to such change; this is decided in the case of Briggs and Briggs vs. Glenn & Bryant, 7 Mo. R. 572.

3d. The circuit court must be its own judge of the proof of the execution of all instruments offered in evidence, and in this case the amount and kind of evidence given of the execution of the bond offered, does not appear; it was therefore insufficient, as we are bound to presume this principle has been often decided by this court.

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4th. If the law was correctly ruled by the circuit court on the trial, it is very clear the motion for a new trial was properly refused, there being evidence from which a jury might well find for either of the parties.

NAPTON, J., delivered the opinion of the court.

This was a suit before a justice of the peace of Randolph county, brought by Henry Matthews against Sterling Coalter, upon the following agreement: "We the undersigned do agree to pay the sum of one dollar for all wolves that is killed by any of said assignors if the wolf is started in fifteen miles of Green Moore's for twelve months from this date. All persons must assign this subscription within four months. January 29, 1841;" which was signed by said Coalter, and said Matthews, and several others. Immediately after the word "miles," appeared written the word "square," with a black line drawn over it. Matthews obtained a judgment in the justice's court, for eight dollars and costs. Upon an appeal to the circuit court, a trial *de novo* was had, the result of which was a verdict and judgment for the defendant Coalter.

At the trial, the plaintiff who had been previously ruled to give security for costs, desired to use Green Moore, one of the obligors on his bond, as a witness, and for that purpose tendered another bond in lieu of the one then on file; but the court refused to permit this to be done, on the ground that the bond tendered was not sufficiently proved. To this, exceptions were taken.

It was proved, or admitted on the trial, that the plaintiff had killed eight wolves, at a place about thirteen miles from Green Moore's house.

It seems that some time in the month of February, 1841, there was what is termed by the witnesses an *infair* at the house of one Rowland; that several persons on their way to this entertainment, called at the house of Coalter, the father of defendant; that this article for the extermination of wolves became the topic of conversation, and one Estis, who it seems had written the agreement, read it to the company for the purpose of procuring subscribers. Defendant on that occasion requested Estis to put his name down as a subscriber, and it was accordingly done. Afterwards this *wolf article* was much discussed at Rowland's, and there also several additional subscribers were procured.

Several witnesses swear, that when the article was read at Rowland's, it had the word "square" in it.

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Haliburton, a witness for defendant, testified, that sometime in the winter, or spring of 1841, at Centreville, he saw a paper in the possession of Green Moore, said to be a wolf article, to which said Moore was soliciting subscribers; he did not read the article, but heard it read, that it became a question whether the article would include one Lowry who proposed signing it, but that it seemed to be admitted, that it would not, and thereupon he saw some person, he knew not whom, with a pen in hand, and saw the pen above or about the paper, but did not see it touch the paper, and did not know that any word was erased from the paper, but heard some one say afterwards that "the article now would include Lowry." He also heard the article read, and it read differently from what it did before. To this evidence exceptions were taken.

The defendant's sister swore that she was present at her father's, when defendant authorized his name to be put to the article; that she heard Estis read it, and looked over his shoulder, and read it partially herself; that it then contained the word "*square*." This witness being requested to give the contents of said article, repeated it *verbatim*, as far as the word *square*, but could go no further. Witness further stated that the article was dated in 1841, and that she had not seen it, or heard it read since, but had heard it frequently spoken of.

Another witness testified that he had subscribed to an article having for its object the destruction of wolves, written by one Snodgrass; and that article only included all wolves killed within fifteen miles square of Green Moore's; this witness was at Rowland's infair, and saw the article in dispute; and seeing his name to it, without his authority, and suspecting some change, he examined it, but found it with the word *square* in it, not erased.

A witness was examined to discredit the testimony of Miss Coalter. During the progress of this examination of witnesses, the defendant offered to file a new bond, similar to the one first proffered; and also offered to prove the solvency of the persons named in said bond, but the court overruled the motion; and to this an exception was taken.

The deposition of Estis proved that he, the witness, wrote the article of agreement in controversy, sometime in the latter part of 1840, at the house of one Rowland, that he wrote it with the word *square* in it, but at the suggestion of Green Moore, he erased it; that this erasure was made before the name of any subscriber was put to it; that he read it afterwards at the house of Coalter, and at the request of Young Coalter, the defendant placed his name to it.

The court gave the following instructions at the instance of the defendant:

1. The law presumes the erasure in the article offered by the plaintiff to have been made since its execution, and the jury must take it so to have been done, till the plaintiff removes that presumption by satisfactory evidence.

2. The article is the basis of the plaintiff's action, and if the jury find that said article has had the word *square* erased since the defendant signed the same, and without his consent, it is void as to him.

3. If the jury are not satisfied from the evidence in this cause, that the erasure in the article offered in evidence, was made before the defendant signed his name thereto, or since that time with his consent, they must find for the defendant.

4. Anything done or said in relation to the contents of the article of agreement by any one having at the time the use or possession of the same, for the purpose of obtaining subscribers, and at the same time reading the same, is evidence for the consideration of the jury.

It appears from the record, that there were several mistrials, and that a verdict was finally rendered, by consent, by a majority of the jury. The verdict was for the defendant, and after an unsuccessful motion for a new trial, judgment was rendered in the circuit court on the verdict.

1. The first assignment of error we will notice, is the refusal of the circuit court to permit a new bond for costs to be filed, with a view to let in the testimony of Green Moore, who was the plaintiff's security in the first bond. There is no doubt of the propriety of permitting such substitution, when a suitable state of facts is presented. The refusal of the court in this case, it seems, was based upon the insufficiency, or defectiveness of the new bond; what the specific objections to the new bond were, does not appear, and we therefore presume them to have been substantial and valid objections.

During the progress of the trial, and after a portion of the witnesses had been examined, a similar bond was again tendered to the court, having in view, as we may presume, a similar object. This untimely application met with the same fate. The propriety of admitting the substitution of a new bond in lieu of the first one given, at this stage of the proceedings, with a view to let in the obligor or security, upon the original bond as a witness, must necessarily depend upon the circumstances of the case. If the witness thus sought to be introduced had been present in court during the whole investigation, and no effort to render him competent had been made previous to the trial, a court might very well hesitate to permit the release of the witness, especially in a case which in its progress had exhibited the most palpable contra-

dictions of witnesses. Such a permission, at such a time, might operate to the prejudice of the opposite party, who not being apprized of such an intention to use the witnesses thus rendered incompetent by his adversary's consent, might in this way have been prevented from taking steps to procure his exclusion from the court house during the examination of the other witnesses. Where, however, the attempt to get the witnesses released has been made in good faith, at the earliest period practicable, and that attempt has failed through mere formal objections to the execution of the proffered bond, we know of no reason why the party should not be permitted at a later period to get the benefit of his witness, notwithstanding such witness may have been among the bystanders at the trial, and heard the contradictory evidence of the examined witnesses. Such indulgences are, however, discretionary, and the judge who presides at the trial, and observes the conduct of the parties, can better exercise that discretion than the court of review, having before it only the report of the trial on record.

2. The propriety of admitting Haliburton's testimony is the next question presented by the record. As original evidence to establish an erasure it was incompetent; for Green Moore, who had possession of the paper and read it, would be the best witness to prove that fact. But considering this transaction as a continuous one, from the time the subscription paper was written until it was closed, we are disposed to regard what was said and done by persons having the paper with a view to procure subscribers, as a part of the *res gestæ*. It is upon this principle, that what passed at Rowland's when the subscription paper was read, was only admitted; and upon the same principle the witness Haliburton might testify about the facts that transpired at Centreville, though neither plaintiff nor defendant were present. As to what the witness said about Lowry, it was explanatory of the mode in which he received an impression that an alteration was made in the paper at that time, though its materiality does not appear upon the record, there being no evidence to show where or at what distance from Green Moore's, Lowry did reside.

3. The instructions to the jury were calculated to give the defendant the benefit of every doubt which the conflict of testimony may have created. The law presumes honesty of purpose and of action, until the contrary is shown. The ancient rule of evidence was, therefore, to presume alterations and erasures of written instruments to have been made at the time of, or anterior to their execution; *Bailey vs. Taylor*, 11 Cond. R. 531—Judge Cowen's note and authorities there cited; *Phil. Ev.* vol. 1, p. 299. And although considerable diversity of opin-

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ion has been manifested in modern cases, the weight of authority is decidedly in favor of the ancient rule; *omnia presumuntur legitime facta donec probetur in contrarium*. There are exceptions to this rule, but it does not appear that the present case is one of them. Where an alteration or erasure appears suspicious on its face, as if the ink differ, or the hand-writing be that of a holder interested in the alteration, it must be explained. Professor Greenleaf thus states the doctrine: "If nothing appears to the contrary, the alteration will be presumed to be co-temporaneous with the execution of the instrument. But if any ground of suspicion is apparent upon the face of the instrument, the law presumes nothing, but leaves the question of the time when it was done, as well as that of the person by whom, and the intent with which the alteration was made, as matters of fact to be ultimately found by the jury. These questions are of course first determined by the court, when they are raised upon a preliminary objection to the introduction of the instrument, but they are again open to the jury;" Green. Ev. 600.

Judgment reversed and cause remanded.

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1. Where a defendant is not served with process, and does not appear to a suit by attachment, the judgment upon publication of notice is a special one, and does not authorise an execution against any but the property attached.
2. If in such a case, if a general judgment be erroneously entered, it will not authorise an execution except against the property attached.
3. It is for the circuit court to determine whether an attorney has authority to appear in that court.

ERROR to Callaway Circuit Court.

JONES for Plaintiff.

POINTS AND AUTHORITIES.

1. From all that appears upon the record, J. Barton Bates had no authority either to practice as an attorney at law, or to prosecute the said notice for said defendant. See 3rd Monroe, page 192; 6 Mo. Rep. 439; Theobald on Principal and Agent, page 244 and 256.

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2. The judgment being general was not therefore void, and if not void, it was both binding and operative until reversed upon appeal or by writ of error. If the court have jurisdiction of the subject matter, and the party defendant have either actual or constructive notice of the proceeding against him, the judgment cannot be void, whatever the form thereof may be. I presume no rule of law is better settled than this. See the following authorities: 4 Peter's Rep. 471-2; 3d Scammon's Rep. 106 and 108; Starkie on Evidence, 2nd vol. p. 1278; Rev. Statutes of 1835, p. 469; sec. 7 and 13th clause; 1 Bibb. Rep. 346; 3 Monroe Rep. 195.

3. If the judgment is not void, then the execution being in due form of law, and substantially following it in all necessary particulars, was erroneously quashed. See Rev. Stat. 1835, page 82, sec. 51 and 1st and 2nd clauses.

GAMBLE & BATES, for Defendant.

For the defendant, Holliday, it is insisted, that it was wholly irregular and illegal to issue a general execution on that judgment record. The proceedings were under the Rev. Code of 1835, and that law expressly forbids such execution; title attachment, page 77, sections 10 and 11.

McBRIDE, J., delivered the opinion of the court.

Isaac Clark commenced in the Callaway Circuit Court, at the October term, 1843, his action against Marshall Holliday. The attachment was levied on the real estate of the defendant, and as to the defendant, returned "not found in Callaway county." At the return term, the defendant not appearing to the action, the plaintiff obtained an order of publication against him; and at the succeeding April term, 1844, the defendant still failing to enter his appearance, and publication having been made against him, the court entered a judgment of default, and awarded a writ of enquiry returnable to the next term of the court. At the October term, 1844, the damages of the plaintiff were assessed by a jury, and a general judgment rendered thereon. On this judgment an execution was issued to the sheriff of Callaway county, commanding him to make the damages and costs by a sale of the real estate attached. A sale was made which produced but a small fraction of the damages and costs, and the execution returned not satisfied as to the residue. Afterwards, on the 8th of May, 1845, a second execution was issued, directed to the sheriff of St. Louis county, and which

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was returned by him to the October term, 1845, endorsed "satisfied," setting forth the manner, and further stating that since the money came to his hands it had been attached, and he summoned as garnishee by virtue of process emanating from the court of common pleas for St. Louis county, at the suit of the plaintiff against the defendant, and praying the order of the court as to what disposition he shall make of the money. At the return term of the last execution, the defendant by his attorney appeared in court, and filed his motion to quash the execution, assigning as reasons therefor, 1st. Because said writ was issued improvidently and by mistake: 2nd. Said writ was issued oppressively and fraudulently: 3rd. Said writ was issued unlawfully and without any warrant in law, being founded on an *ex-parte* judgment, rendered in a suit brought by attachment, in which said Holliday was not served with process, and did not appear by attorney." The court sustained the motion and quashed the writ; to which the plaintiff excepted and has brought the case to this court by writ of error.

The proceedings and judgment in this cause were had under the provisions of "an act to provide for the recovery of debts;" Rev. Code, p. 75, and the several supplemental acts thereto. By the fifth section of the general act among others, is a provision that if the defendant is personally summoned to answer the action, then the like proceedings shall be had between him and the plaintiff as in ordinary actions on contract and a general judgment may be rendered in the premises. But where the defendant does not voluntarily enter his appearance to the action and is not served with process, then the 11th section declares that the judgment taken by default shall bind only the property and effects attached, and no execution shall issue against any other property of the defendant, nor against his body; nor shall such judgment be any evidence of debt against the defendant in any other suit. The plaintiff having thus obtained his *ex-parte* judgment, it became necessary to throw around the defendant a further shield to protect him against the avidity of his creditor, and save the remaining part of his property from sacrifice; and this was done by the enactment of the second subdivision of the 51st section, which declares that where there is a special judgment against the property, money or effects attached the execution shall be a special *fiery facias* against such property, money or effects, only, and may be levied on the same, whether in the hands of the officer or secured by bond.

The judgment then, there being no personal service on, nor voluntary appearance of the defendant, should have been a special one, extending alone to the effects attached, and the execution should have follow-

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ed the judgment. And this upon principle, for the proceeding being *in rem*, it would be a strange anomaly to enter a general judgment against the defendant; such a judgment would transcend the jurisdiction of the court, which had no power on the person of the defendant. .

It is contended that as the plaintiff has a general judgment, he is entitled to sue out an execution to any county in the state, and that the only remedy which the defendant has to avoid this consequence is to have the judgment corrected. This might be well enough, but still we think the plaintiff had no right to complain, because the court would not permit him to avail himself of an error committed in rendering or entering up the judgment. It cannot be seriously urged that any injury has resulted to the plaintiff by reason of the action of the court; or that the court did anything more than was its duty under the circumstances in this case. It is the duty of the court at all times to see that its process is not used as the means of working injustice, or operating injuriously to the rights and interests of parties. If the judgment had been properly entered, the plaintiff could not have obtained execution against any other property than that levied on belonging to the defendant, and to that extent he has already obtained execution. But the judgment is an *ex parte* one, obtained at his own instance, and he cannot avail himself of any irregularity which, through inadvertence or otherwise, may have occurred.

There was another point raised concerning the authority of the agent to appear, and file a motion to quash the execution; and authorities have been cited to show that after a party has been absent from the State for a great number of years, and without having been heard from, the court may require the agent or attorney to produce some evidence of his authority to act in the case. This case bears no analogy to those, and if the circuit court was satisfied with the evidence produced, as the appearance was in his own court, we see no reason upon which an objection could be made here.

The other members of the court concurring, the judgment of the circuit court is affirmed.

MONTGOMERY & WIFE vs. LANDUSKY.

1. The act of Congress of June 13, 1812, confirmed the lots to the claimants, and the certificate of the recorder is only evidence of that confirmation.

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2. Although the recorder's certificate be *prima facie* evidence that the person to whom it was issued was entitled to the lot confirmed, it may be rebutted.
3. A certificate issued to the legal representatives of A, when A had, before the certificate issued, sold the lot to B, will not operate to the benefit of the heirs of A.

APPEAL from Washington Circuit Court.

COLE, for Appellants.

POINTS AND AUTHORITIES.

1. That the lot in controversy was confirmed to the children of Russ.
2. That their title as proved was sufficient to maintain the action.
3. That the deed to Andrew Henry, did not operate a bar to the recovery of plaintiff, because it was not a present operation and subsisting title. 3 John. R. 375; 6 Peters' Rep. 312.
4. That a trespasser in the condition of defendant, cannot protect himself by shewing an outstanding title in a stranger, superior to plaintiff's. 4 John. Rep. 202; 1 Tenn. Rep. 515.
5. If Henry had title at any time, yet when presented on the trial as a bar, it could not operate as such, as his right of entry was tolled by lapse of time, there having more than twenty years expired, between date of confirmation and the time of trial in the circuit court.
6. The plaintiffs are the legal representatives of Thomas Russ. The confirmation uses these words as a description of the person to whom the grant is made, for the plaintiffs do not claim title to this lot from Russ, but by way of donation from the United States. 8 Mo. Rep. 84; 4 Mo. Rep. 319; 5 M. R. 164; Bl. Com. Title Descent; 14 John. Rep. 193; 11 John. Rep. 91; 6 Littell's Rep. 468; C. Litt. 8, 446, a 6; 3 John. Rep. 336.
7. There is no evidence to show that Thomas Russ settled, or cultivated this lot at any time. See U. S. Land Laws, vol. 1, pages 620 and 885.
8. There is no evidence to show that Andrew Henry had at any time whatever, the use or possession of this lot.
9. There could be but one right of entry in the lot, and that was and is in the plaintiffs.

FRISSELL, for Appellee.

On the part of the defendant in error it is contended,

1. That Andrew Henry, or those claiming under him, at the time of the confirmation, were the *legal representatives* of Thomas Russ, the original claimant of the lot in question, and that the confirmation by the recorder of land titles, on the 15th of July, 1826, under the act of Congress of May 26, 1824, enured to the benefit of Andrew Henry, and those claiming under him.

2. That the fact that Landusky produced the conveyance from Thomas Russ to Andrew Henry, is evidence of privity of title between Andrew Henry and the defendant in error.

3. That the conveyance of Thomas Russ to A. Henry, divested Russ and *his heirs* of all title to the lot in question; and neither Russ, nor his heirs could recover the possession against one in possession.

4. That plaintiff in error claiming by right of his wife, is estopped by the deed from Russ to Henry, from claiming possession of the premises.

5. That the plaintiff in error cannot insist upon any right acquired from John Russ, unless he shows that he is a purchaser without notice of Henry's title; and this conveyance from Russ to Henry was duly acknowledged and recorded, and plaintiff had constructive, if not actual notice.

NAPTON, J., delivered the opinion of the court.

This was an action of ejectment brought by Montgomery and wife, against Landusky, in the circuit court of Washington county. The following facts were agreed upon on the trial:

James Montgomery, plaintiff, was married on the 3d January, 1827, to Celeste Russ, a lawful heir of Thomas Russ, deceased. Thomas Russ died in the year 1809. On the 24th September, 1842, John Russ, a lawful heir of Thomas Russ, deceased, by deed of bargain and sale, duly made, executed and delivered, for a valuable consideration, conveyed his right and interest in the lot of ground in the declaration mentioned, to the said plaintiff. On the 15th of July, 1825, the recorder of land titles, by virtue of the act of Congress of 26th May, 1824, confirmed to Thomas Russ' legal representatives, a lot in the village of Mine a Breton, being the lot in the declaration mentioned. It is also found that Nancy, otherwise called Narcissa, the lawful wife of said Thomas Russ, and the mother of said Celeste, wife of said plaintiff, died long before the commencement of this suit. On the part of defendant it was shown that said Thomas Russ, deceased, on the 29th September, 1806, conveyed by deed of bargain and sale, the premises in the declaration mentioned to Andrew Henry.

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Upon this state of facts, the court gave judgment for the defendant.

It may be assumed that the effect of the fourth section of the act of May 26, 1824, was to invest the villagers of Mine a Breton, with the same title which the inhabitants of the villages enumerated in the act of June 13th, 1812, acquired by that act. No conflicting title having emanated from the government at any time previous to the passage of the act of Congress, of May 26, 1824, it is of no consequence, in the present case to determine at what particular time the title of the claimants in Mine a Breton, accrued. We will suppose them to have the full benefit of the act of 13th June, 1812, and that proof of inhabitation or cultivation prior to the 20th December, 1803, would authorize them to claim a certificate of confirmation from the recorder, as though that village had been one of those enumerated in the act.

The recorder of land titles then, in 1825, issued a certificate to the legal representatives of Thomas Russ, certifying that by virtue of the act of 1812, the lot in controversy was confirmed.

The agreed case speaks of this as a confirmation by the recorder, but we presume the recorder did not attempt to exercise a power which he did not possess, but merely certified that the lot had been confirmed by act of Congress. This certificate of the recorder is frequently termed a confirmation, and has been held by this court in several cases to be *prima facie* evidence of title. But the defendant produces a deed from Thomas Russ to one Andrew Henry, in 1806, thereby showing, that if the plaintiffs claim under Thomas Russ, their ancestor had parted with his title, and consequently showing themselves without a shadow of title.

But it is agreed that the certificate of the recorder in this case, being to the legal representatives of Thomas Russ, enures to the benefit of Thomas Russ' heirs, at the date of its issuance, as the meritorious cause of the donation. The idea appears to be entertained that the recorder's certificate was in fact a grant of the land by the United States to Thomas Russ' legal representatives; that no proof being introduced to show that Thomas Russ himself ever did inhabit or cultivate the lot prior to the 20th Dec'r, 1803, this grant or donation of the recorder enures only to the benefit of the person to whom the certificate issued. Such a construction of the powers of the recorder under the act of 1824, would lead to a total perversion of the purposes of that act, and make these certificates of the officers mere instruments of fraud and injustice. There is nothing, we apprehend, in the previous decisions of this court to justify such an interpretation of the act. It is true, that Judge McGirk, in the case of Janis' adm'r vs. Gurno, 4 M. R. 458, appeared

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to think that the recorder's certificate was *prima facie* evidence, not only of the original confirmation by the act of 1812, but also that the claimant to whom the certificate was granted, was the person entitled to the benefit of such confirmation. This opinion seemed to recognise the power of the recorder to determine derivative titles, and so far has the sanction of the supreme court of the United States in the case of Strother vs. Lucas; but after all, proof that the person to whom the certificate issued, was not the individual, and did not derive any title from the individual, who actually cultivated the lot on the 20th Dec'r, 1803, was always admitted to rebut the *prima facie* case made out by the production of the recorder's certificate. It had been settled, long prior to this decision that the act of 1812, *proprio vigore*, confirmed the lots to the respective claimants. The act of 1824 could not give any additional strength to that confirmation, for it was already a complete statutory grant, but merely provided a mode by which evidence of that grant could be obtained from the government. The certificate of the recorder is merely evidence of a previous grant; and therefore, proof that the person who occupied or cultivated the lot on the 20th Dec., 1803, had prior to the date of the confirmation sold the lot to another, would merely show that the heirs of the occupant were not his legal representatives, *quoad* the title to this confirmed lot. Even supposing that this certificate had issued to the heirs of Thomas Russ, still I apprehend that if Thomas Russ had sold the lot, the title of his heirs would be defeated. For the recorder does not pretend to give any title; he merely certifies that the act of 1812 has given title—and to whom? to the person who occupied the lot on the 20th Dec., 1803. The recorder's certificate is *prima facie* evidence of this confirmation, but if it be shown that the occupant in 1803 has parted with his title, notwithstanding the recorder issues his certificate to the heir of such occupant, such proof rebuts the *prima facie* case, and strips the heir of every pretence of title.

Judgment affirmed.

JAMES CLEMENS, Jr. vs. R. T. BROWN, Sr., & R. T. BROWN, Jr.

When an execution is sued out upon a judgment within a year; another execution may issue at any time, without a *sci. fa.*

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APPEAL from Perry Circuit Court.

COLE, for Appellant.

It will be contended on the part of the appellant:

1. That the order of James Clemens, endorsed on the original execution, was a *supersedeas* to that execution, and that by the seizure under that execution, no property of defendants was altered. 1 Mo. Rep. 154, Brown vs. the sheriff of Cape Girardeau.

2. It will be contended that there is in the present case, and in a *supersedeas* on a writ of error, a strict analogy. See Bac. Ab., title Execution, letter Q.

3. That although the sheriff is bound to obey the exigency of the writ, yet the plaintiff, if he choose, may control the same, provided such control is not injurious to the rights of defendant.

4. That a *venditioni exponas* in this case, would have been useless, as there was nothing to sell.

5. That the *alias* execution awarded, was the legal and only available means by which Clemens could collect his debt, and therefore erroneously quashed.

6. A *scire facias* to revive was not necessary in this case, before the *alias* execution issued. Douzman vs. Potter, 1 Mo. Rep. 518; Lindell vs. Benton & Kennery, 6 Mo. Rep. 361.

SCOTT, J., delivered the opinion of the Court.

Clemens having recovered a judgment against Brown on the 27th March, 1840, issued execution thereon on the 30th of the same month, which, after having been levied, was, by order of Clemens, returned with the following endorsement, "the sheriff will return the above execution staid by my order," James Clemens, Jr.

Afterwards, on the 8th August, 1845, another execution issued on the same judgment, which being again levied, Brown moved to quash it. Among the various causes assigned for that motion, that only will be noticed, which we suppose influenced the court, viz: that from the lapse of time between the first and second execution, the presumption of payment arises, and no other execution could issue without a *scire facias*. The motion to quash was sustained, and Clemens appealed to this court.

If a *fi. fa.* or *elegit* be sued, and no execution be had thereon, there

Boyd & Mitchell vs. Holmes.

may be another *fi. fa.* or *elegit* several years after, without a *scire facias*, if continuances are entered from the first *fi. fa.* or *elegit*. So if a *fi. fa.* be taken out within the year, and *nulla bona* returned and continued down several years, a *capias ad satisfaciendum*, may issue without a *scire facias*. 6 Bac. 107.

The same law is declared in *Aires vs. Hardass*, 1 Strange 100.

The foregoing doctrine is recognized by this court in the case of *Dowsman vs. Potter*, 1 Mo. Rep. 368; and it was moreover declared that the entry of the continuances was unnecessary.

The other Judges concurring, the judgment will be reversed.

BOYD & MITCHELL vs. HOLMES.

Upon a petition to foreclose a mortgage, all the pleas having been overruled or stricken out, the court should have entered judgment by default for want of a plea, and assessed the damages immediately, they being liquidated by the instrument sued on, and no enquiry being necessary.

APPEAL from the Polk Circuit Court.

WINSTON, for Appellant.

POINTS AND AUTHORITIES.

The point relied upon by the plaintiffs, is, that the court ought to have given both the instructions asked for by the plaintiffs. The mortgage deed being the instrument sued upon, and being read in evidence to the court without any objections, was not only good evidence, but the very best that could have been offered; and the court in deciding that it was not sufficient to warrant a verdict for the plaintiffs, violated the plainest principle of evidence. The suit being for the simple foreclosure of the mortgage, and the deed being the foundation of the suit, it was the only evidence which was necessary to be produced, and in fact all that the plaintiffs could have been permitted to produce, unless the defendant had offered to impeach the deed.

The error of the court in this case is so manifest, that I deem it wholly unnecessary to adduce any authority.

Armstrong vs. McMillon.

Scott, J., delivered the opinion of the court.

This was a petition to foreclose a mortgage by the appellants against the appellee, who filed several pleas to the suit. They were all either stricken out or overruled, and it appears the cause was then submitted to the court, although there was no issue. The mortgage was read, and the plaintiff asked the court to declare the law to be, that he was entitled to recover. The court refused to do so and the plaintiff excepted, and took a non-suit, and after an unsuccessful motion to set it aside, appealed to this court.

There being no plea in the cause, the truth of the petition stood admitted, and it was the duty of the court to have entered judgment by default, for want of a plea, and to have assessed the damages immediately; no writ of enquiry being necessary, as the damages were liquidated by the instrument sued on.

The other Judges concurring the judgment will be reversed, and the cause remanded.

ARMSTRONG vs. McMILLON.

In an action of replevin, the defendant pleaded in abatement, "that he was in possession of the property as a receiver in a suit in chancery, in which A was plaintiff, and B, (*the plaintiff*,) was defendant, and that the said property was put into his hands and possession as receiver, by virtue of legal authority."

Held,

1. If this be a good defence, it would be available under the general issue.
2. The plea is defective, in not showing how, when, and where, he was appointed receiver.

ERROR to Newton Circuit Court.

Scott, J., delivered the opinion of the court.

This was an action of replevin, brought by Armstrong against McMillon, to recover the possession of certain slaves. McMillon pleaded an abatement, "that he was in possession of the slaves in the declaration mentioned, as a receiver in a suit in chancery, in which Littleberry Bedford, and Nancy, his wife, are complainants, and the said plain-

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tiff, Hugh C. Armstrong, and James C. Armstrong, are defendants; and that the said property was put in his hands and possession, as receiver by virtue of legal authority, which the said defendant is ready to verify," &c. To this plea there was a demurrer, which was overruled, and judgment was entered for the defendant.

If the property were taken from Armstrong by authority of law, and was in the hands of a receiver, appointed by a court of chancery, that court was competent to restrain any action by Armstrong, to regain possession of it, so long as the right to it was undetermined. It would be a manifest contempt of the authority of the court, for a party in that indirect way to attempt to defeat its order. If the defendant held the slaves as the receiver of a court of chancery, his proper course was, to apply to that court to restrain the proceedings of the plaintiff. As he has not thought fit to do so, but has defended the action at law, his defence, if it do exist, would be available under the plea of not guilty, given by the statute to the defendant in replevin. As it is, the plea in abatement is insufficient. The facts, constituting the defence, are not alleged with sufficient precision to enable the party to take issue on them. It does not appear when, where, or how the defendant was appointed receiver.

The other Judges concurring, the judgment will be reversed, and the cause remanded.

 REED VS. THE HEIRS OF AUSTIN.

1. The lien of a judgment will hold, against a prior unrecorded deed. *Hill vs. Paul*, 8 Mo. R.; affirmed.
3. The recitals in a sheriff's deed cannot be contradicted by parol evidence.
3. A sale under a voidable judgment, cannot be impeached in a collateral proceeding.
4. A sale under a satisfied judgment, is void only against the purchaser with notice.
5. Irregularities in a sheriff's sale can only be corrected by a direct application for that purpose, and cannot be taken advantage of in a collateral proceeding.

ERROR to Carroll Circuit Court.

ABIEL LEONARD, for Plaintiff in error.

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For the reversal of this judgment, the plaintiff in error will insist upon the following

POINTS AND AUTHORITIES.

I. An unregistered deed is valid against an execution purchaser, without notice at the time of his purchase, regardless of the question of notice in the judgment creditor.

1st. The object of registry laws is merely to give notice of the state of the title to those who are about to acquire a specific interest in the land, and therefore, though the words be general, and extend to all persons, they must be confined in their application, to persons taking a specific interest in the land from the *same* grantor.

Upon this principle, a mere trespasser, claiming no title to the land, cannot allege the non-registry of the plaintiff's deed, nor can a defendant in ejectment, claiming the land under a title derived from a different grantor, rely upon that matter to invalidate the opposing title.

2nd. Such being the object of these laws, and the persons to be protected by them, the notice which English equity declares to be equivalent to registry, and which is made so by the express terms of our statute, is a notice at the time of taking the specific interest in the land, which otherwise would be defeated by the unregistered deed.

3d. A judgment creditor acquires no specific interest in the land of his debtor. He has neither *jus in re*, nor *jus ad rem*, but a mere general lien. According to the principles of English equity, he acquires a lien upon the debtor's land, as the title then exists in the debtor's hands, and subject to all the equities then against it. When the land is sold under execution, the purchaser's title relates back to the commencement of the lien, so as to cut out all intermediate incumbrances, but not so as to cut off the equities that existed against the land at the time of the judgment, and of which the purchaser had notice at the time of his purchase.

4th. Under the British statutes, these principles were declared, and administered in the court of chancery. In that court it was declared, that although the statute bound the legal title, the notice bound the conscience of the party taking that title. Our statute declares the unregistered deed valid against the grantor, and those who have notice, and here, therefore these principles have become legal principles, and are to be administered at law. As in equity, an unregistered deed would prevail against an execution purchaser with notice, regardless of the question of notice to the judgment debtor, so now, under our statute,

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such a deed ought to prevail at law, under the same circumstances. 4 Cruise's Dig. 112, 115, 491, 496, 499, 482, 483, 484, 485, and 486. Latouch vs. Dunnusany, 1 Sch. & Lef. 137 & 162. Le Neve vs. Le Neve, 3 Atk. Rep. 646. Forbes vs. Deneston, 4 Brown's Ca. Parl. 190. Jackson vs. Burgott, 10 John. Rep. 461. Brace vs. Duchess Marlborough, 2 P. Williams. 491. In the matter of Howe, 1 Paige's Rep. 130. Reested vs. Avery, 4 Paige's Rep. page 15. Conrad vs. Atlantic Ins. Co. 1 Peters' Rep. 443; 3 Mass. Rep. Supplement, 573; Rev. Stat. Mass. chap. 59, sec. 28; 4 Mass. Rep. 638. Davis vs. Blunt, 6 Mass. Rep. 488. Trull vs. Bigelow, 16 Mass. Rep. 417. Priest vs. Rice, 1 Pick. Rep. 164. Caffin vs. Ray, 1 Metcalf's Rep. 212. Curtis vs. Mundy, 3 Metcalf's Rep. 405.

Rhode Island—West vs. Rondall, 2 Mason's Rep. 181.

Connecticut—Welch vs. Gold, 2 Rootes' Rep. 287; Moore vs. Watson, 1 Roots' Rep. 387.

Maine—Mathews vs. Demeritt, 22 Maine Rep. 315.

New Hampshire—Colby vs. Kenneston, 4 N. H. Rep. 264

New York—Jackson vs. Burgott, 10 John. Rep. 461.

Pennsylvania—Lessee of Heister vs. Fortner, 2 Binney Rep. 40.

Kentucky—Helm vs. Logan, 4 Bibb's Rep. 78; Campbell vs. Mosley, 6 Littell's Rep. 358; Graham vs. Samuel, 1 Dana Rep. 166; Morton vs. Robards, 4 Dana Rep. 260; Hally vs. Oldham, 5 Mon. Rep. 234.

Virginia—1 Tucker's Com. 270, 271, and 272; Guerrant vs. Anderson, 4 Rand. Rep. 208.

South Carolina—Fort vs. Crawford, 1 McCord's Rep. 268; Reaborne vs. Teasdale, 2 Bay's Rep. 546; Teasdale vs. Atkinson, 2 Bay's Rep. 546.

II. It was competent for the defendant to show that the sheriff sold the two tracts of land separately, and that the tract first sold, yielded enough to satisfy the eight circuit court judgments, of the 3d of April, 1839, that were older than Caton's deed of the 24th April, 1839, and which deed is itself older than the seven justice's transcripts of the 22d of May, 1839; because,

1st. The sale of the first tract, (the n. w. 1-4 of s. 8,) satisfied the eight executions that had been levied upon the land embraced in the sheriff's deed, according to the recitation of the levy in that deed, and thereupon these executions ceased to confer any authority upon the sheriff to sell the other tract; and the subsequent sale of that tract was void, unless the sheriff had other authority to sell, and did in fact sell under such authority. Ex-parte Lawrence, 4 Cowen Rep. 417. Clarke

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vs. Withers, 1 Salk. Rep. 322. Hoyt vs. Hudson, 12 John. Rep. 207
Wood vs. Torrey, 6 Wend. Rep. 562.

2d. The other seven executions conferred no authority upon the sheriff to sell on account of the invalidity of the justice's judgments, upon which they were issued; and if they did confer such authority, it was never exercised, the fair construction of the deed being, that the sale was made under the eight executions which it expressly recites were levied upon the land, and not that it was made by virtue of executions never levied.

3rd. The eight circuit court judgments being older, and the seven justice's transcripts younger, than the defendant's deed from the judgment debtor, if the defendant is excluded from showing the facts offered by him in evidence, the consequence is, that the younger judgments are by the mere act of the officer, tacked to the elder judgments, and the lien of the deed thus squeezed out; and in this manner the defendant is stripped of his property by the act of the officer, of which he had no notice, and against which he has had no opportunity of defending himself.

III. The deed of the 3d of April, 1839, was made in pursuance of the cancelled title bond of 1838, and ought to relate back to the date of the bond, so as to cut out the incumbrance of the intermediate judgment, and vest the legal title, as against the purchasers under that judgment, in the grantee from the date of the title bond.

STRINGFELLOW, for Defendants in error.

1st. The judgments rendered by the justice are valid, and the transcripts were properly admitted in evidence. The sum for which judgment was rendered, being stated in figures, with the \$, is sufficient. The \$, whether it be regarded as an abbreviation, cypher, symbol, or a part of the English language, has a meaning as fixed, certain and definite as the word "dollar," or any other word in our language. Its use has been adopted, and its meaning recognized, by not only the whole people of this country, but by the legislatures of this State, and by every court, from the lowest, to this the most exalted judicial tribunal in the State. Statute 1835-6, title, Fees. *Morris & Lenox vs. Martin*, 8 Mo. Rep. 253. In this case, an account setting out the amount claimed in figures, with the \$, was sustained. See records of this court.

2nd. An insufficient notice will not avoid a judgment. If the court have jurisdiction of the subject matter, and the defendant notice of the

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proceedings, the judgment will not be void, however irregular, or erroneous the proceedings. *Montgomery vs. Farley & Robinson*, 5 Mo. Rep. 235; *Griffin & Kenote vs. Samuel*, 6 Mo. Rep. 50; *Perryman et al. vs. State to use of Relfe*, 8 Mo. Rep. 209; *McNair et al. vs. Biddle et al.*, 8 Mo. Rep. 264.

Judgments by confession, need only be in writing where there is no service of process. A confession of judgment, on service of process, cures all defects in the service. *Davis vs. Wood*, 7 Mo. Rep.

3rd. But admitting the judgments before the justice to be voidable, they cannot be impeached, nor can titles acquired under them be impaired in collateral proceeding; and much less, in such a proceeding, in which neither of the parties to the judgment are interested. *McNair et al. vs. Biddle et al.* 8 Mo. Rep. 264.

4th. The records of the judgments of the Carroll Circuit Court, were properly admitted in evidence. Though for costs alone, without setting out any specific amount, they were valid. It is submitted, that in no court, when a cause is dismissed, will the judgment specify the amount of cost. See records of this court.

5th. The docket of circuit court judgments and decrees, was evidence of the time at which the transcripts were filed. Rev. Code, 1835-6.

6th. The paper offered in evidence by Reed, the defendant below, to show title out of Austin, was properly rejected. *First*, It did not purport to be a copy of the deed attempted to be set up. *Second*, The witnesses all proved that it was not a copy. *Third*, The witnesses all testified that the cancelled deed was a mere title bond; the copy offered was of a deed of bargain and sale. *Fourth*, The canceled deed was destroyed by the parties thereto, and a new deed made in its place. A deed thus cancelled, cannot be set up by a party thereto, and much less by one having no interest therein. *Commonwealth vs. Dudley*, 10 Mass. Rep. 403; *Holbrook vs. Tirrell*, 9 Pickering Rep. 103; *Farrar vs. Farrar*, 4 New Hamp. Rep. 194; 13 Mass. 499.

7th. Evidence of the destruction, and contents of the deed to James Reed was inadmissible. *First*, For the reasons last above given. *Second*, Because the evidence proved it to have been a mere title bond, or a bond to make a deed; and this gave but a mere equitable title, which could not be set up in ejectment. 1 John. Rep. 114; 2 John R. 221, 321; 8 John. Rep. 487.

8th. The deed to the Reedsburg Company was not admissible. It could not be made to revert to, and hold under the title bond to James Reed; and being made after the rendition of the judgments on which the land was sold, was no bar to plaintiff's title.

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vs. Withers, 1 Salk. Rep. 322. Hoyt vs. Hudson, 12 John. Rep. 207 Wood vs. Torrey, 6 Wend. Rep. 562.

2d. The other seven executions conferred no authority upon the sheriff to sell on account of the invalidity of the justice's judgments, upon which they were issued; and if they did confer such authority, it was never exercised, the fair construction of the deed being, that the sale was made under the eight executions which it expressly recites were levied upon the land, and not that it was made by virtue of executions never levied.

3rd. The eight circuit court judgments being older, and the seven justice's transcripts younger, than the defendant's deed from the judgment debtor, if the defendant is excluded from showing the facts offered by him in evidence, the consequence is, that the younger judgments are by the mere act of the officer, tacked to the elder judgments, and the lien of the deed thus squeezed out; and in this manner the defendant is stripped of his property by the act of the officer, of which he had no notice, and against which he has had no opportunity of defending himself.

III. The deed of the 3d of April, 1829, was made in pursuance of the cancelled title bond of 1838, and ought to relate back to the date of the bond, so as to cut out the incumbrance of the intermediate judgment, and vest the legal title, as against the purchasers under that judgment, in the grantee from the date of the title bond.

STRINGFELLOW, for Defendants in error.

1st. The judgments rendered by the justice are valid, and the transcripts were properly admitted in evidence. The sum for which judgment was rendered, being stated in figures, with the \$, is sufficient. The \$, whether it be regarded as an abbreviation, cypher, symbol, or a part of the English language, has a meaning as fixed, certain and definite as the word "dollar," or any other word in our language. Its use has been adopted, and its meaning recognized, by not only the whole people of this country, but by the legislatures of this State, and by every court, from the lowest, to this the most exalted judicial tribunal in the State. Statute 1835-6, title, Fees. *Morris & Lenox vs. Martin*, 8 Mo. Rep. 253. In this case, an account setting out the amount claimed in figures, with the \$, was sustained. See records of this court.

2nd. An insufficient notice will not avoid a judgment. If the court have jurisdiction of the subject matter, and the defendant notice of the

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proceedings, the judgment will not be void, however irregular, or erroneous the proceedings. *Montgomery vs. Farley & Robinson*, 5 Mo. Rep. 235; *Griffin & Kenote vs. Samuel*, 6 Mo. Rep. 50; *Perryman et al. vs. State to use of Relfe*, 8 Mo. Rep. 209; *McNair et al. vs. Biddle et al.*, 8 Mo. Rep. 264.

Judgments by confession, need only be in writting where there is no service of process. A confession of judgment, on service of process, cures all defects in the service. *Davis vs. Wood*, 7 Mo. Rep.

3rd. But admitting the judgments before the justice to be voidable, they cannot be impeached, nor can titles acquired under them be impaired in collateral proceeding; and much less, in such a proceeding, in which neither of the parties to the judgment are interested. *McNair et al. vs. Biddle et al.* 8 Mo. Rep. 264.

4th. The records of the judgments of the Carroll Circuit Court, were properly admitted in evidence. Though for costs alone, without setting out any specific amount, they were valid. It is submitted, that in no court, when a cause is dismissed, will the judgment specify the amount of cost. See records of this court.

5th. The docket of circuit court judgments and decrees, was evidence of the time at which the transcripts were filed. *Rev. Code*, 1835-6.

6th. The paper offered in evidence by Reed, the defendant below, to show title out of Austin, was properly rejected. *First*, It did not purport to be a copy of the deed attempted to be set up. *Second*, The witnesses all proved that it was not a copy. *Third*, The witnesses all testified that the cancelled deed was a mere title bond; the copy offered was of a deed of bargain and sale. *Fourth*, The canceled deed was destroyed by the parties thereto, and a new deed made in its place. A deed thus cancelled, cannot be set up by a party thereto, and much less by one having no interest therein. *Commonwealth vs. Dudley*, 10 Mass. Rep. 403; *Holbrook vs. Tirrell*, 9 Pickering Rep. 103; *Farrar vs. Farrar*, 4 New Hamp. Rep. 194; 13 Mass. 499.

7th. Evidence of the destruction, and contents of the deed to James Reed was inadmissible. *First*, For the reasons last above given. *Second*, Because the evidence proved it to have been a mere title bond, or a bond to make a deed; and this gave but a mere equitable title, which could not be set up in ejectment. 1 John. Rep. 114; 2 John R. 221, 321; 8 John. Rep. 487.

8th. The deed to the Reedsburg Company was not admissible. It could not be made to revert to, and hold under the title bond to James Reed; and being made after the rendition of the judgments on which the land was sold, was no bar to plaintiff's title.

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9th. Admitting that Caton had conveyed the land to James Reed, by deed of date prior to the rendition of the judgments, it was never recorded, and was no bar to plaintiff's title under the judgments. *Waldo vs. Russell*, 5 Mo. Rep. 393; 1 Met. 212; *Jones vs. Luck*, 7 Mo. Rep., 4 Mo. Rep. 386, 403; *Hill vs. Paul*, 8 Mo. Rep. 479; 4 Bibb, 78; 1 Dana Ky. Rep, 166, 359; 7 Serg. & Rawle, 286; 1 B. & Der. Eq. Ca., 470. No notice of either deed was alleged, prior to the judgments.

10th. A sale by the sheriff of more land than was sufficient, is not void, but the title of the purchaser is good. The statute is merely directory. *Evans vs. Wilder*, 5 Mo. Rep. 323; *Rector vs. Hart*, 8 Mo. Rep. 460.

11th. Objections to a sheriff's sale, can only be made by a party interested, and not by him, in a collateral proceeding.

12th. A sheriff's deed cannot be contradicted by parol evidence. 7 Wend. Rep.; 20 John. Rep.

13th. A party not interested cannot, in a collateral proceeding, contradict a sheriff's deed, and have a sale made by him set aside.

Scorr, J., delivered the opinion of the court.

Austin brought an action of ejectment against Reed, to obtain possession of lands in the declaration mentioned, and recovered judgment.

Austin derived title to the premises in controversy, under judgment of the circuit court, dated 3d of April, 1839, and justices' judgments docketed 22d May, 1839. Executions issued on these judgments, by virtue of which the land was sold on the 5th August, 1839, for which a deed was afterwards executed by the sheriff to the plaintiff.

David Reed set up a title in himself and others as the Reedsburg Company, which consisted of a deed dated 24th of April, 1839, but not recorded until the 16th September following; and offered to prove that the purchaser of the land at the sheriff's sale had notice, at the time he purchased, of the unrecorded deed to the Reedsburg Company; to which evidence objections being made, the court excluded it from the consideration of the jury.

The defendant also offered to prove that the lands in the sheriff's deed mentioned were sold separately; and that the first tract sold brought a sum sufficient to satisfy the eight executions issued from the circuit court, and which it appears from the recitals in the sheriff's deed were

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alone levied on the lands, and consequently that the sale of the other tract to satisfy the other executions which had not been levied, was without authority and void.

The point involved in this cause, whether a judgment creditor is not preferred to a grantee, under a prior unregistered conveyance, has been under consideration in this court in cases heretofore determined. It has been again argued, and we are called upon to say whether the views heretofore expressed shall be maintained or abandoned.

In the consideration of questions involving the construction of statutes in relation to the same matter, when there has obviously been a departure from the phraseology of an old law in the enactment of a new one, we are compelled to believe that it was not done without reason. The first statute to which our attention has been called as throwing light upon this subject, is that of the 27th Hen. 8th, which declared that no estate should pass by bargain and sale, unless enrolled in six months. It was held under this statute, that the deed is valid except as to subsequent purchasers without notice. The reason of this decision is plain. It was the object of the law to remedy the mischief growing out of the secret conveyances authorized by the Statute of Uses, which being unknown to the common law, produced inconveniences to those who afterwards purchased the estate, without knowledge of such prior deeds. But if the subsequent purchaser had notice of the previous conveyance, the reason for passing the statute did not apply. It would require great ingenuity to give to these cases a shape which could throw light upon that now under consideration. They decide nothing as to creditors, and they depend upon the peculiar circumstances which produced the law upon which they are founded.

We think we are well warranted in saying that the idea of registering deeds was borrowed from the English statute, 2d and 3d of Anne, cap. 4, which expressly made in the place therein mentioned, all unregistered deeds fraudulent and void against subsequent purchasers and mortgagees for a valuable consideration. The statute of New York, in relation to the registry of deeds, has adopted the phraseology of the English law, and makes unregistered deeds void against subsequent purchasers and mortgagees in good faith and for a valuable consideration.

The interpretation put upon the English statute is well settled, and a mortgage not registered has preference over a subsequent docketed judgment. Here then is a statute which has been in force nearly a century and a half; it has been judicially liquidated; its construction is fixed and settled. Why should the legislature of this State, abandon-

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ing in this instance the caution and prudence manifested on so many other occasions, in refusing to depart from the language of the English statutes, when incorporating them into our code, adopt a new mode of expression in relation to the registry of deeds, if it were intended that the precise interpretation should be put upon it, and it should have no other scope or aim than the English statute? We cannot believe that the legislature adopted so unusual a course without design. That a statute, whose language and construction was as familiar as household words, has been dropped, and other language adopted, when the only purpose was to obtain the end sought by the old statute, is an assumption so much at war with our experience on this subject, that we are compelled to disclaim it.

Our statute avoids all unregistered conveyances, except between the parties thereto and such as have actual notice thereof. No doubt is entertained that an unregistered deed will prevail over a subsequent purchaser or mortgagee with notice. But the question is, whether it goes farther and affects a creditor without notice. A similar statute prevails in Massachusetts. In that State suits are commenced by an original writ, and an attachment against the estate of the debtor which is held as security for the debt. Under that statute it is held that an attaching creditor, without notice at the time of his attachment, will be preferred to a grantee under an unregistered conveyance. Our mode of procedure in bringing suits, in the end attains the same results as that produced in Massachusetts, but in *inverso ordine*. There the lien commences with the service of the attachment; here it commences with the determination of a suit. A creditor is not passive in commencing his suit; he looks to the lien of his judgment as a security, and confessions of judgment are taken with an eye to the security of the lien conferred by the law on judgments. There is a difference between the lien of a judgment under our laws, and that created by the 13th Ed. 1st. That statute does not in direct terms create the lien. But courts have so construed the statute which gave the *elegit*, as to infer a lien from the power to take the lands in execution. The lien grows out of the right to issue the *elegit*, and is dependent upon it. A judgment with a stay of execution creates no lien on land, until the plaintiff has a right to issue execution thereon; *Scriba et al. vs. Deanes et al.*, 1 Brockenbrough. Our statute in express terms makes the judgment a lien, and continues in force for three years, and permits its indefinite extension, by *scire facias*, from time to time. The sale of land under a junior judgment or decree, passes the title of the defendant, subject to the lien of all prior judgments and decrees then in force. Liens cannot be said

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to come involuntarily when suits are brought to obtain them. Nothing is more usual than to obtain judgments in justices' courts, and file transcripts in the circuit court, with a view to obtain the security of the lien of a judgment; and creditors do not imagine that a right thus secured could be affected by notice of an unregistered deed at the time of the sale of the lands, subjected to these liens. It is begging the question to say that a judgment is only a lien on lands possessed by the debtor at the time of its rendition, and cannot be made to extend to lands that have been conveyed. Whether they have been conveyed as regards the judgment creditor, is the very matter in controversy. Chancellor Kent, speaking of the rule which prevails in Pennsylvania, in which a docketed judgment is preferred to an unregistered conveyance, commends it for its simplicity and certainty in making every encumbrance whether it be a registered deed or a docketed judgment, in cases free from fraud, depend for satisfaction according to the priority of the lien upon the record, which is open for public inspection. And even if it should be, as has been said, that such is not the law of Pennsylvania, yet we may claim in support of the doctrine, the commendation of that jurist, to whom the profession is so much indebted, and whose industry has explored, and whose learning has adorned so many branches of our law. No decision of this court has gone farther than the principles above expressed; nor is it necessary that we should go beyond it in determining this case. To some extent the impression prevails that such is the law. The case of *Jones vs. Luck*, 7 Mo. Rep., which in its circumstances is so much like the case of *Cushing vs. Hurd*, 4 Pick., a case in Massachusetts, whose statute we have seen, is similar to ours, is an evidence of this. It is of no great importance how this question is settled, but it is of some concern that the law on the subject should be fixed and settled. No good can result from changing the interpretation of our statute. Indeed we may pause and reflect how far under the circumstances we would be warranted in making it. As far back as the year 1835, this court determined that a title under a junior judgment would prevail over a prior unregistered deed. The same principle was involved in the case of *Jones vs. Luck*, and yet the question was not made in the court below. And afterwards came the case of *Hill vs. Paul*, 8 Mo. Rep., in which the very point involved was determined. In this state of the question, our statutes underwent a revision: the construction put upon the law is reported to the general assembly, and they adhere to the law as it had been before written. They saw no departure from policy or principle in the course of the decisions of the court; or at least none which provoked their interference. Indeed

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some of the soundest jurists regret the construction that has been put upon the registry act by the English and American courts, and openly avow their preference for the doctrine, that the priority of every instrument affecting real estate shall be determined by the date of its record. Cruise says the utility of the register acts is proved to a demonstration by two facts, namely: that lands in register counties bear a higher price, and money is lent on the security of those lands at a lower rate of interest, than on estates situate in counties where there is no register; and he continues, it would be a great amendment of the law, if it were enacted by the legislature, that no averment should be admitted either at law or in equity, that a person claiming under a deed that was registered, had notice of a prior unregistered deed. "We might," he says, "in this case borrow some wisdom from ancient France, where several points respecting substitutions being unsettled, and the laws on this head being different, in different parts of that kingdom, they were all reduced into one by the ordinance of 1747, which was framed by the Chancellor D'Aguesseau, after taking the sentiments of every parliament in the kingdom, upon forty-five different questions proposed to them upon the subject. The 39th question is whether a creditor or purchaser, having notice of the substitution before his contract, a purchaser is to be admitted to plead the want of registration." All the parliaments, except that of Flanders, agreed that he was. That to admit the contrary doctrine would make it always open to argument, whether he had or had not notice of the substitution. That this would lead to endless uncertainty, confusion and perjury; and that it was much better that the rights of the subject should depend upon certain and fixed principles of law, than upon rules and constructions of equity, which must be arbitrary and consequently uncertain. The ordinance was framed accordingly.

Our statute relative to the registry of deeds, fixes no time within which they must be recorded. They must then be put upon the record in a reasonable time; *Cushing vs. Heard*. 4 Pick. 257. Prudence would dictate this. Urgent considerations alone should influence us to put a construction upon our registry law, which would enable a purchaser to hold a deed for land in his pocket, and suffer his grantor to contract debts on the faith of that land to which he has no title. Prudent men examine the records, to ascertain if there are encumbrances on the estates of their debtors, and if they find none they imagine themselves secure, and will extend the credit, and refrain from steps to make themselves safe.

As to the question arising on the evidence to show that the property

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was sold in parcels, and that one parcel sold for a sum sufficient to satisfy the eight executions, which alone were levied on the lands, it may be remarked, that it has been made a question whether a sale under a satisfied judgment, is void or only voidable. But it seems well settled, that it can only be void against him who purchases with notice of the fact and in bad faith; Jackson vs. Anderson, 4 Wendall, 474; Jackson vs. Cadwell, 1 Cowen, 622. The principle of these cases would restrain the court from interfering with the judgment, independently of the doctrine of the cases of Jackson vs. Roberts, 7 Wendall, 83; Jackson vs. Vanderbeyden, 17 John. Rep. 167; Jackson vs. Sternberg, 20 John. Rep. 49, which is, that evidence is inadmissible to contradict the recitals in a sheriff's deed in a collateral proceeding; but that irregularities in conducting a sale, must be corrected by direct application to the court for that purpose.

Judge NAPTON concurring, the judgment will be affirmed.

McBRIDE, Judge, dissenting.

PREWITT, ET AL. VS. JEWELL.

Que. Is the lien of a judgment destroyed by the death of the debtor?

ERROR to Boone Circuit Court.

D. TODD, for Plaintiffs,

Assigns the following as sufficient reasons for a reversal of the judgment of the circuit court:

1. That the lien of a judgment creditor expires upon the debtor's death upon his real estate.
2. The lien at law is a general lien, and not becoming specific by a levy before the death, upon any portion of the realty, the judgment creditor cannot acquire a general lien upon the lands of the deceased, after the death.
3. Upon the death of a judgment debtor, the debts are fixed in a course of administration, and a court of law has no jurisdiction to enforce a collection of any judgment by *scire facias*, or any other remedy.

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4. The lien of such judgment upon the lands, is a statutory remedy, and can only be enforced according to the statute, at law; and a court of equity has no jurisdiction to enlarge the lien, or enforce it.
5. When the lands of a judgment debtor are sold upon a junior judgment, subject to the prior judgment, neither at law, nor equity, can the purchaser be subjected to the payment of the elder judgment.
6. If the elder judgment creditor fails to enforce his lien by execution before the debtor's death, the court cannot in law or equity revive the lien, or enforce the collection of the debt.
7. It is a misjoinder to make the purchaser of the land, and the administrators of the deceased debtor, joint parties, for the same judgment cannot be entered.
8. It is a misjoinder to make the heirs of the deceased debtor parties with the purchaser and administrators, when the judgment is not for the realty, but for a personal debt.

LEONARD & GORDON, for Defendant.

POINTS AND AUTHORITIES.

1. The lien of a judgment upon the real estate of a debtor, is not extinguished by the death of the judgment debtor. Rev. Statute of 1835, title Judgments and decrees, sec. 2, 3, 6 and 7; title Executions, sec. 4 and 6; Rankin & Schabell vs. Scott, 12 Wheat. Rep. 177; Taylor vs. Thompson, 5 Peter's Rep. 371.
2. In a proceeding to revive the lien of a judgment, the heirs, personal representatives, and *terre tenants* ought all to be made parties. Rev. Stat. of 1835, title Judgment and Decrees, sec. 7; 6 Bac. Abr. 115; executors of Morton vs. *terre tenants* of Croghan, 20, John. Rep. 106; Jackson vs. Shaffer, 11 John. Rep. 515.

Scott, J.

Jewell, in October, 1840, obtained a judgment against George Northcut in a justice's court, and immediately thereafter filed a transcript thereof in the office of the clerk of the circuit court of Boone county. Afterwards others obtained judgments in like manner against Northcut, and filed transcripts of them. On these last judgments executions were issued, and the lands of Northcut sold to satisfy them. Prewitt, the plaintiff in error, and Oliver Parker, since deceased, became the purchasers. In the interval between the issuing of the executions, and the

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sale under them, Northcut died. Jewell afterwards in October, 1843, sued out a *scire facias* to revive his lien against the administrator and heirs of Northcut, and the purchasers of the land at the sheriff's sale. On a demurrer to the *scire facias* judgment that the lien be revived was given, to reverse which Prewitt has sued out this writ of error.

The main question presented by the record, is whether the lien of a judgment is extinguished by the death of the judgment debtor. If the death of a judgment debtor produce such an effect, it must be by reason of some statutory provision, or of some manifest incongruity between the existence of the lien and laws whose meaning and construction are beyond all question. Such an idea borrows no support from the common law, or early statutes made in aid thereof. After the statute of 13 Ed. 1, subjecting lands to execution, after the death of the ancestor against whom a judgment had been rendered, a *scire facias* lay on the judgment to revive it against the heir. *Jefferson vs. Morten*, 2 Saun. 6. In this State in 1807, judgments were declared to be liens on the real estate of the debtor, and made to continue in force for five years. By an act passed in 1822, the duration of the lien was limited to three years, and provision made for the revival of it against the heirs of the debtor. The same provision is in the revision of 1825, and is continued in that of 1835. The law relative to administration passed in 1825, section 49, permitted executions to issue against a decedent's estate, after the lapse of eighteen months from the grant of letters testamentary or of administration. A power to sell deceased person's estates on execution, being entirely subversive of the administration law; and rendering a compliance with its provisions, relative to the classification of demands impossible, the act of the 30th December, 1826, was made, which prohibited any execution from issuing on any judgment, or decree rendered against the testator, or intestate, in his life time, or against his executors or administrators after his death, but directed all such demands to be classed, and proceeded on in the probate court. By some oversight this act was omitted in the revision of 1835; but notwithstanding the omission executions were not issued against the estate of deceased persons in the hands of executors or administrators; however, to secure this exemption beyond all controversy, the act of Feb'y. 1, 1839, was enacted, which directs that no execution shall be issued against the lands, tenements, goods, chattels, or effects of any testator or intestate, upon any judgment against an executor or administrator as such; and as no execution can issue on a judgment against a deceased person without a *scire facias* to revive it against the execu-

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tor or administrator, and as the same reason which operates to withhold an execution on a judgment against the executor or administrator would withhold it on a judgment against the deceased, we are of the opinion that this act afforded to a deceased person's estate the same protection against executions that was given by the act of 1826.

We thus have the estate of deceased persons, freed from executions. If there is a lien it must be enforced in some other way than by execution. Is there any thing in the administration law which negatives the continuance of the lien, or which cannot be reconciled with its existence? The lien is given by law, and by law it can be modified and controlled. The administration law classes the demands against an estate, and after providing that funeral expenses, expenses of the last sickness, and debts due the State, shall constitute the first three classes, directs that judgments rendered against the deceased in his life time, shall constitute the fourth class; thus giving those judgments priority over all other debts except those above mentioned. It is then provided, that all demands against any estate, shall be paid by the executor or administrator, as far as he has assets, in the order in which they are classed, and no demand of one class shall be paid until all previous classes be satisfied; and if there be not sufficient to pay the whole of any one class, such demands shall be paid in proportion to their amounts. The personal estate is made the primary fund for the payment of debts, and in the event of a deficiency of personal assets, the lands may be sold, and when sold the purchaser takes it, discharged from all liability for the debts. Can the idea of a lien exist with the above provision for the payment of debts? The fourth class of demands consists entirely of judgments rendered against the deceased in his life time. The argument assumes that those judgments are liens on the land. If one judgment of the class is a lien, then all the other judgments of that class are liens, and there are no other debts in the class than judgments. If the judgments are liens, their priority will depend on the date of their rendition, and if they have been rendered at different times, the oldest will have priority, and the others will be satisfied in the order of their dates. If the personal assets should prove insufficient to pay the debts, and the lands be sold for that purpose, if the sum realized from the sale should be inadequate to the satisfaction of all the judgments, then the oldest judgment must be satisfied first, the next oldest in the next place, and so on of the rest, in the order of their dates. This must be the consequence if the lien exists. Is not then the existence of the lien in direct conflict with the provision above cited, that if there be not sufficient to pay the whole of any one class,

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the demands of that class shall be paid in proportion to their amounts? If the lien conflicts with this provision *a mutto fortiori*, it does with that which declares that no demand of one class shall be paid until all previous classes be satisfied. The rule of construction provided for in the revised laws of 1835, is that all the statutes shall be deemed to have passed on the same day, notwithstanding they may have been passed, or taken effect at different times. They are all to stand unless found so repugnant that they cannot subsist together, in which event the last law shall prevail. The act concerning judgments and decrees, by which the lien is created, was approved March 19th, 1835. And the law relative to administrations was approved on the 21st March, 1835. So the law relative to administrations which is inconsistent with that relative to liens, will prevail. *Scott vs. Whitehill & Finch*, 1 Mo. Rep.

There is no hardship in this result. It may happen in a particular case, that a judgment creditor may be injured by this construction of the law, but in most cases it will be otherwise. If the lien of the judgment is destroyed by the administration law, that law makes ample reparation for the injury. It gives preference to judgment debts due by the deceased over all others except funeral expenses and expenses of last sickness, which are generally small, and debts due the State, which rarely exist; and subjects not only the lands but all the personal estate to the payment of those judgments, before any other debt can be paid, except those above mentioned. Judgment creditors, in nineteen cases out of twenty, would prefer the security afforded by the administration law for the payment of their debts, to that offered by a bare lien on the land.

The statute directs that the sale of lands under a junior judgment, shall pass the title of the defendant, subject to the lien of all prior judgments or decrees then in force. The land on which Jewell's lien attached having been sold under a junior judgment subject to that lien, and that lien becoming afterwards extinct, an interest in the land will result to the estate of Northcut, which may be subjected to the payment of its debts. In what manner that object shall be obtained, I will not now determine.

NAPTON, J.

The only question in this case, is whether the lien of a judgment is extinguished by the death of the judgment debtor, and this question is

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to be determined by the statute law of this State, as it stood previous to the revision of 1845.

The act concerning judgments and decrees, declares, that they shall be a lien on the lands of the debtor situate in the county, where the judgment or decree is rendered; that they shall commence on the day of the rendition of the judgment, and continue for three years, subject to be revived, &c.; and that the sale of lands under a junior judgment, shall pass a title subject to the lien of all prior judgments. This act further makes provision for the revival of a judgment, not only against a judgment debtor himself but against his legal representatives, the *terre-tenants*; or other person occupying the lands.

So far then, the existence of the lien, as well after, as before the death of the judgment debtor, is expressly provided for, and unless there be some law which in terms or by implication repeals this statute, or that portion of it to which we have referred, the plaintiff in error cannot maintain his position. The act concerning administration, it is contended, has this effect.

One section of the administration law, which is apparently inconsistent with the law concerning judgments and decrees, is the 7th section of the 4th article, which says, "that any person having any demands against an estate, may establish the same by the judgment, or decree of some court of record, and exhibit a copy of *such* judgment, *whether rendered before or after the death* of the deceased, to the county court." This section is so obviously either a *misprint* or a careless and unsuccessful attempt to comprehend in one sentence two heterogeneous ideas, that it is entitled to no weight in fixing the construction of another act, clearly and unequivocally expressed. If it were designed by this section, as was probably the case, to require the judgment creditor to present a copy of his judgment to the county court, whether it be a judgment against the deceased, or has been rendered against his representatives, it leaves the question of the lien where the first section of the same article placed it, and to that section alone we are referred for the repeal, or modification of the statute concerning judgments and decrees.

This section provides for a classification of all demands against an estate, and places judgments against the deceased in the fourth class. All the demands in a specified class are to be paid *pro rata*, and no demand is paid until all the demands in the class or classes preceeding it, have been discharged.

It will be observed that all judgments are not liens; they are only liens upon the real estate of the debtor, lying in the county where the

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judgment is rendered. A person may have no real estate in the county where he resides, and where a judgment is obtained against him, and such a judgment is no lien upon his real estate lying in another county; or the debtor may have been sued in another county from that in which he lives, and the judgment will be no lien upon his lands in the latter county. The two acts, therefore, may both stand; they were passed at the same session, and though one may have been approved by the executive a week sooner, or later than the other, they are to be construed as having taken effect on the same day.

Admitting, however, that the clause in the first section of the 4th article of the administration law, is absolutely inconsistent with the provisions of that portion of the statute concerning judgments and decrees, which provides for the continuance of the lien for three years, without regard to the death of the judgment debtor, upon what principle shall we make the latter statute, the several sections of which seem to have been framed with deliberation and caution, yield to a solitary clause in a single section of the administration act? Shall it be on principles of general policy? Let us look for a moment at this view of the subject.

The lien of a judgment is given to a creditor as a security for the payment of his debt; that lien, the law declares, shall bind the land for three years. It can not or ought not to be forfeited, except by some act of the judgment creditor. Upon the faith of this lien, the creditor remains inactive, and no further steps are taken to molest the debtor. Would creditors take confessions of judgment, a very common security, and give them indulgence upon the strength of such security, if the death of the debtor could at any moment deprive them of this security? Would it be any compensation to the creditor, who relies upon his judgment, and the sufficiency of the land bound by that judgment to pay his debt, to be turned round to a *pro rata* division of this land with fifty subsequent judgment creditors upon an insolvent estate, and thereby get perhaps ten cents in the dollar of his debt?

There may be cases where the creditor, by being placed in the fourth class, would get the whole of his debt; but in such cases, it seldom matters much, whether he has any judgment at all. We look to the cases in which creditors *generally* seek securities of this kind, and what are they? Are such confessions of judgment *usually* taken where the debtor is solvent, and possessed of property amply sufficient to meet his debts, and with no pressing demands against him?

It is not from such men that security is desired or needed. It is where the debtor is already tottering upon the verge of insolvency,

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with debts pressing hard upon him, and a feeling of insecurity already awakened among the community, that the creditor presses forward for his judgment. After this is obtained, which the law says shall bind the land, he ceases the proceeding, and enables the debtor, if time will be of any avail, to extricate himself from his embarrassments. But this indulgence would not be extended, if the creditor is told, that in case of his debtor's death, his lien is gone, and he must be paid *pro rata* under the administration law.

Authorities are needless to show that where laws are passed at the same time, the courts must give effect to both, if possible. Applying this rule of construction here, a limited meaning is necessarily given to the term judgment, as used in the clause of the administration act, to avoid a conflict with various provisions of the law concerning judgments and decrees.

The act of 1838 having prohibited executions against a dead man's estate, the judgment creditor must take his judgment to the county court, and procure an order of sale. This was not, however, the law in 1835.

Judge McBride not having heard the argument of this cause, and therefore declining to give any opinion, the judgment of the circuit court will be affirmed.

THE STATE vs. MURDOCK.

An offence which is made felony by statute, whether it were a felony at common law or not, must be charged to have been committed *feloniously*.

ERROR to St. Charles Circuit Court.

COALTER, for Plaintiff,

Insists that this court has jurisdiction of this case. This court is a tribunal created by the constitution, and where powers are conferred, and duties devolve upon it, by the constitution, no enactment of the legislature can take them away.

NOTE.—On a motion to quash the writ of error in this case, it was held: That the State could sue out a writ of error to an arrest of judgment in a criminal case.

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The constitution, article 5th, sec. 3, says this court shall exercise a general superintending control over all inferior courts of law.

The revised code of 1835, page 158, sec. 33, gives all courts power to issue all writs necessary to carry into effect their jurisdiction. In the case of the State vs. Foster, 2 Mo. R., page 210, the court entertain a writ of error in favor of the State, reverse the judgment of the circuit court, and render the judgment against the accused, which the circuit court ought to have rendered. In the case of Clinton vs. Dugall, the court assert the duty of this tribunal to exercise its superintending control over inferior tribunals.

The only question in this case is, as to how the court will get jurisdiction of the person of the defendant. And I believe that under the 33d section, page 158, of the revised code referred to above, the court will order a *capias* to bring in the person of the defendant.

EDWARD BATES, for Defendant.

I suggest some preliminary objections, either one of which, if valid, will make it needless to examine whether the motion in arrest was rightfully or wrongfully sustained.

1. Murdock is not a party lawfully before the court, so as to give the court jurisdiction over his person. He cannot appear by attorney, and no step has been taken, or can now be taken, to coerce his personal attendance.

2. This bill of exceptions is no part of the record, and must be wholly disregarded by this court.

3. The sustaining of the motion in arrest, is not of itself a final judgment; and if not final, is not the subject of appeal or writ of error.

4. The law plainly prescribes what judgment this court shall give when it reverses the judgment in a criminal cause, and such judgment is not appropriate to this case.

SCOTT, J., delivered the opinion of the Court.

Murdock was indicted and convicted for having in his possession counterfeit coins, with intent to utter them as true. The offence was not charged to have been done feloniously, nor was that word used in the indictment. The judgment was arrested, and the State has sued out this writ of error.

The having in one's possession counterfeit coins, with intent to utter them as true, is made a felony by our statute. Every offence which is

Switzer & Harrison vs: Carson & Hays.

made a felony by statute, must be charged to have been done feloniously, whether it was a felony by common law or not. The word feloniously is indispensably necessary in all indictments for felony; whether statutory or by common law.

The other Judges concurring, the judgment will be affirmed.

SWITZER & HARRISON vs. CARSON & HAYS.

The affidavit on which an attachment issued, alleging "that the defendants were about to remove their property out of the State so as to hinder and delay creditors," upon a plea in abatement to the affidavit, evidence of the indebtedness of defendant to plaintiff or others is immaterial.

APPEAL from Chariton Circuit Court.

CLARK, for Appellants.

The appellants rely upon the following points and authorities to reverse the judgment of the circuit court:

1. This being a suit by attachment, and the truth of the affidavit being the true issue submitted for trial, it was right and proper that the plaintiffs should have been allowed to give the jury any evidence tending to show an intent to remove their property for the purposes, and in the manner sworn to in the affidavit.

It would be very difficult to show that a defendant was about to remove his property to hinder and delay his creditors, unless the plaintiff who makes the allegation, was allowed to show that the defendant, at the time of making the charge in the affidavit, had creditors. *Foster vs. Wallace*, 2 Mo. Rep. 187, and the authorities cited in that case.

2. That the words "hinder and delay," in the statute mean a fraudulent hindrance and delay, and therefore upon the trial of such an issue as was submitted in this case, any evidence tending to show a fraudulent intent at the time the affidavit was made, was proper, and ought to have been allowed by the court. 1 Story's Equity, 363-4.

STRINGFELLOW, for Appellees.

The defendants rely upon the following points to sustain the judgment of the circuit court:

Blakey vs. Saunders.

1. In this case it was not material to enquire into the amount of defendant's indebtedness. The issue was as to the intent of defendants in the removal of their property.

2. The indebtedness was admitted, and evidence was only admissible to show fraud in connection with indebtedness.

3. Indebtedness is no evidence of fraud.

Scorr, J., delivered the opinion of the court.

The appellants sued the appellees by attachment in assumpsit. The ground of the attachment was, that the appellees were about to remove their property out of the State, so as to hinder and delay their creditors. The truth of the fact in the affidavit, on which the attachment was founded, was put in issue by the appellees, by a plea in the nature of a plea in abatement.

On the trial it appeared that the appellees were tobaccoists, engaged largely in buying, manufacturing and selling tobacco; and that at the time of levying the attachment, they were about to make a large shipment for sale. The appellants offered evidence to show that the appellees were largely indebted to others than themselves, which was objected to, and excluded by the court. There was evidence in the cause, of the indebtedness of the appellees to others than the appellants.

A verdict was found for the appellees.

The only question raised in the argument of the cause is the propriety of the action of the court in excluding the evidence of the indebtedness of the appellees, offered on the trial. The issue did not involve the question of the indebtedness of the appellees to the appellants; for the purpose of that trial their indebtedness to them was admitted; and evidence of indebtedness to others could not have been material. Indeed, if it was necessary, there appears from the record to have been enough of it before the jury.

The other Judges concurring, the judgment will be affirmed.

BLAKEY vs. SAUNDERS.

The *sci. fa.* to revive a judgment, set out the judgment as follows: "As well the sum of \$1,200, a certain debt, as the sum of \$248 for his damages which he had sustained, as well by reason of the detention of that debt as for his costs," &c. On the issue upon the plea of *nul tiel record*, the record offered in evidence shewed a recovery of \$1,200 debt, \$248 damages and costs. Held, to be a fatal variance on the plea.

Eaton vs. Vaughan.

APPEAL from Greene Circuit Court.

Scott, J., delivered the opinion of the court.

Saunders, the appellee, executor of Wm. Saunders, deceased, sued out a *scire facias* to revive in his own name, a judgment recovered in the Greene Circuit Court, by Wm. Saunders in his lifetime, against James W. Blakey, the appellant. The *scire facias* recites that, "Whereas at a circuit court held within and for the county of Greene, on the 3d Monday after the fourth Monday of April, A. D. 1843, a certain Wm. Saunders recovered against a certain James W. Blakey, late of said county, as well the sum of \$1,200, a certain debt, as the sum of \$248 for his damages, which he had sustained as well by reason of the detention of that debt *as for his costs*, by him about his suit in that behalf expended," &c. On the trial of the issue on the plea of *nul tiel* record, the record of the judgment was read in evidence, from which it appeared that Saunders recovered judgment against Blakey for \$1,200 debt, \$248 damages and for costs. The record was objected to as evidence, but the objection was overruled and judgment was rendered against Blakey, the appellant.

There was a manifest variance between the *scire facias*, reciting that the sum of \$248 included as well the damages as the costs, and the record read in evidence, showing that the sum of \$248 was for the damages only, and that there was a further judgment for costs. The variance is fatal, the defendant having put the record in issue by his plea of *nul tiel* record; Bibbins, vs. Noxon, 4 Wend. 207.

The other Judges concurring, the judgment will be reversed and cause remanded.

EATON vs. VAUGHAN.

1. In an action of trespass against the captain of a steamboat for taking away a slave on his boat, it is not necessary to show that he knew the person to be a slave.
2. Ordinary diligence used in attempting to ascertain if he were a slave, is no justification to the person carrying the slave away.

ERROR to Howard Circuit Court.

ADAMS & HAYDEN for Plaintiff.

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To reverse the judgment of the circuit court the plaintiff in error will insist upon these points:

1. That the defendant was not liable if he *bona fide* believed the person to be a free man, and merely permitted him as such to go on his boat as a passenger. See 7 Dana Ky. Rep. 252; Story on Bailments, section 591; 2 Cowper, 476.
2. That the damages were excessive and outrageous.

LEONARD for Defendant.

In support of the judgment of the circuit court, the counsel for the plaintiff below will rely upon the following points and authorities:

1. The defendant's voluntary act of receiving the plaintiff's slave upon his boat as a passenger, and carrying him as such passenger to St. Louis for a reward, without the consent and against the will of the owner, is a trespass; Tyson vs. Ewing, 3 J. J. Marshall, 186.
2. When the act, which is the immediate cause of the injury, is the voluntary act of the party, he is liable to the party injured for all the damages occasioned thereby; and it is no justification or excuse that he acted in good faith, and after the use of the utmost diligence, in the belief that he was doing a lawful act.

If the act be not voluntary the defendant is still liable, unless it happened utterly without any fault on his part; and it is not enough that he used ordinary diligence to guard against injury.

Upon the proof in the cause, the court was warranted upon either of these principles in giving the plaintiff's instructions, and rejecting those moved by the defendant; Weaver vs. Ward, Hobart's Rep. 290; Scott vs. Shephard, 3 Wilser's Rep. 407; Boss vs. Letton, 24 Eng. Com. L. Rep. 384; Goodman vs. Taylor, 24 Eng. Com. L. Rep. 385; Jennings vs. Fundeburg, 4 McCord's Rep. 161; Vincent vs. Stinehour, 7 Vermont Rep. 63; Bullock vs. Babcock, 3 Wend. Rep. 392, 6, Bac. Abr., title Trespass, page 589.

3. If the excuse set up by the defendant, that he was a common carrier, and as such received the plaintiff's slave upon his boat as a passenger, in good faith, and after the use of reasonable diligence, in the belief that he was a free man, be a good justification or excuse for the act done, yet such defence cannot be given in evidence under the general issue, but must be specially pleaded in bar; 1 Chitty's Pleadings, (7 edition) 538; Boss vs. Letton, 24 Eng. Com. L. Rep. 132; Knapp vs. Salisbury, 2 Camp. Re. 500; Co. Litt. 282; 2 Esp. N. P. 558.

4. Where the law has prescribed no measure of damages, but sub-

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mitted that matter to the discretion of the triers of the fact, this court, it is believed, has never yet reversed a judgment merely upon the ground of excessive damages. But if that cause be sufficient in any case, the present damages are not such as to warrant this court in interfering with the verdict; *Tyson vs. Ewing*, 3 J. J. Marshall Rep. 186; *Beardmon vs. Carrington and others*, 2 Wilser's Rep. 258; *Wilsferd vs. Berkley*, 1 Burr. 609; *Duberly vs. Gunning*, Tenn. Rep. 651.

SCOTT, J., delivered the opinion of the court.

Vaughan brought an action of trespass against Eaton, under the following circumstances: Vaughan resided at Glasgow in Howard county, and owned a slave named Charles, who was reared in that county by his father-in-law, Wm. Ward. On the night of the 22d August, 1844, Charles escaped from Vaughan, and as the steam boat Wapello, of which Eaton was captain, was then lying at the port of Glasgow, and a suspicion arising that Charles was on board the boat, early next morning diligent search was made for him, but he was not found. Charles was described to the officer of the boat who made the search. Eaton was very indignant that a suspicion should have arisen that the slave was on his boat. On the same day on the return of the boat to St. Louis, she stopped at Boonville, and Charles who had stolen a horse, and taken the papers of a free negro to whom he bore some resemblance, presented himself to Captain Eaton, and asked if he could take passage on his boat to St. Louis, remarking at the same time to the Captain, that he supposed he would like to see his free paper. The captain replied he would; and a license to reside in this State, under the hand and seal of the clerk of the Howard county court was exhibited, examined and handed to Captain Nichols of Glasgow, a passenger, of whom the enquiry was made, whether it was genuine? Nichols replied it was. Charles thereupon paid his passage money, and was admitted as a passenger without any questions. At this time a stranger stepped up and said he knew the boy, and that he was raised by Wm. Ward of Howard county.

Pompey Spence, the free negro to whom the license to reside in this State had been granted, and from whom it was stolen, was described in said license as a mulatto boy, about 22 years old, five feet eight inches high, and straight hair, with his right hand having been broken. Charles was a mulatto boy about 24 years old, five feet eleven inches high, with sound hands and a scald head, having very little hair upon it, the top of his head being entirely bald. Charles called himself

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Pompey. A witness who had seen Charles on the boat, saw afterwards Pompey Spence whom Charles personated, and testified that they were very much alike in face, countenance and complexion; and that a person not knowing either boy, and not seeing them together, might easily mistake the one for the other. The officer who searched the boat for Charles at Glasgow, and heard a description of him afterwards, on their passage to St. Louis examined him and compared him with the description in the license, and was satisfied that he was the person to whom the license had been granted. On the examination, Charles extended his right hand, and made it appear as if he could not shut one of his fingers. Captain Eaton, near the mouth of the Missouri river, was informed by the cook of the boat, that he believed Charles was a runaway slave. This induced Eaton again to examine Charles. The examination took place in the presence of the officer who searched the boat at Glasgow, and resulted in the conviction that Charles was the person he pretended to be. There were on board of the boat ten or twelve passengers from Glasgow and Fayette, some of whom knew Charles; but it does not appear that any inquiries respecting him were made of them, or that Eaton knew that they were acquainted with the slave.

Fifty or a hundred persons were at the boat landing at Boonville, when Charles took passage.

Charles was taken to St. Louis, and has never been heard of since. But for his having a scald head he was estimated to be worth \$600. The scald did not affect his capacity for service, and might reduce his value fifty dollars; he was otherwise a very likely boy.

Evidence was given of expenses incurred in seeking to find the boy.

The declaration contained two counts. One charged the defendant with taking and carrying away the plaintiff's slave, whereby he was wholly lost to the plaintiff. The other charged that the defendant took and carried away the slave, and converted him to his own use.

The court instructed the jury at the instance of the plaintiff, that in order to entitle him to recover, it was not necessary that the defendant should have taken off the boy, knowing him to be a slave. Nor is it sufficient to excuse the defendant from such liability, that he in good faith believed the boy to be a freeman, and used reasonable diligence to prevent imposition by the boy.

That the jury may, if they think proper, give smart money against the defendant, over and above all the damages actually sustained by the plaintiff.

The defendant asked instructions asserting a doctrine directly the

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reverse of that contained in the first of the above instructions given at the instance of the plaintiff, which were refused by the court.

The court then told the jury that the evidence disclosed mitigating circumstances in the conduct of the defendant.

The plaintiff obtained judgment for nine hundred dollars.

At the common law, in an action of trespass for enticing away a servant, it was necessary to allege and prove a *scienter*, that the person enticed away was a servant. In England, servants were of the same race and color as freemen, and all persons are supposed to be free. If, says Lord Coke, a free man married a *neif*, she thereby became free, and the lord had his action against the husband to recover her value. And albeit he did not know her to be a *neif*, yet the action lieth against him; for he must take notice thereof at his peril, unless she be out of the service of the lord and vagrant; and then if one not knowing her to be a *neif*, married her, some say that in that case no action lieth against the husband. 1 Coke 426. A *villain in gross* at the common law, says Littleton, could be conveyed only by deed; the lord was considered as having a right to his services, and not that property in his person which he possessed in other things. But this view of the subject has not been adopted by the slave States in this Union; for however the humanity of our laws may protect slaves from the cruelties of their masters, yet they are as strictly property as any other chattels. Trespass will not lie for animals *ferae naturae*, for the reason that there is no property in them; but if one of those animals be reclaimed, and is afterwards destroyed by a trespasser, would it be any defence to the action to say that there was no knowledge that the plaintiff had property in the animal? If a ferryman sets a slave across the Mississippi, without the consent of his master, whereby he is lost, would it be any answer to an action of trespass to say he had good reasons to believe that the slave was a free man? A tortious act, though accidental, will be a cause of action. It is not necessary that it be willful and malicious. 1 Willis 577. In the case of *Ward vs. Weaver*, Hob. 290, it was said that no man shall be excused of a trespass except it may be judged utterly without *his fault*. It must appear that the act was inevitable. Our slaves would be very much impaired in value, if injuries to our property in them could go unredressed, under the plea that those who committed them were ignorant of the fact that they were slaves. Every negro asserting his right to freedom, is presumed a slave, and it devolves on him to show his right to the condition which he claims. It is true, slaves have volition; they may leave the service of their masters, and may impose themselves on others for free men, but it is necessary for the security of the owners of

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such property, that they who treat them as such should do it at their peril. The strict prohibition against trading with slaves without the written consent of their masters, and the great disproportion of the number of free negroes to that of the slaves, lessen very much the seeming severity of this rule.

In the case of *Tyson vs. Ewing*, 3 J. J. Mashall, the court says, slaves although protected in life and limb by the humanity of our laws, are nevertheless regarded as property in the strictest sense of the term. And as far as it respects the form of the action, we do not feel ourselves authorized to discriminate between them, and any other kind of property.

We have seen the recent case of *Nelson vs. Whitmore*, 1 Rich. S. Car. Rep., a case somewhat similar to this in its circumstances, being an action to recover the value of a slave who was a bright mulatto, freckled, and with hair somewhat reddish, and who, in the opinion of some, was white, but others thought him a mulatto; in that case it was held, that a knowledge of the fact that the boy was a slave, was necessary to be proved. That the idea of property was of the essence of a conversion, and that when there was no appropriation of property, there could be no conversion. This doctrine, it was admitted, was derived from the common law, under which servants were of the same race and color as their masters. But we do not feel ourselves at liberty to make any discrimination between the property in our slaves, and any other chattels. They who interfere with it to the prejudice of our rights, do it at their peril, otherwise there will be no security for it.

We do not think that the instruction of the court in relation to smart money was correct.

The jury should not have been told that they might give it, if they thought proper. Such damages can only be given when the circumstances of the case warrant it. The error, however, of this instruction was in some measure obviated by the subsequent charge, in which they were reminded of the mitigating circumstances of the defendant's conduct. As there were expenses incurred in endeavoring to recover the slave, and as his worth was estimated by some at \$550, we do not think the excess of damages so great, as would warrant us in setting aside the verdict. We do not feel assured, all things considered, that such a course would ultimately prove an advantage to the defendant. There is nothing in this transaction which throws the least suspicion upon the purity of Captain Eaton's conduct. That some diligence was employed by him, cannot be denied; but that a greater degree of diligence would in all probability have prevented the loss to the plaintiff, can-

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dor compels us to avow. We think that the hope of making his escape on the boat, manifestly induced the slave to runaway. The facility of escaping on the boats navigating our waters, will induce many slaves to leave the service of their masters. Their ingenuity will be exerted to invent means of eluding the vigilance of captains, and many ways will be employed to get off unnoticed. One escape by such means, will stimulate others to make the attempt. The greater portion of our eastern frontier, being only separated by a navigable stream, from a non-slaveholding State, inhabited by many who are anxious, and leaving no stone unturned to deprive us of our slaves; our interior being drained by large water courses, by means of which its commerce in steamboats is maintained with the city on our frontier, render it necessary that the strictest diligence should be exacted from all those navigating steamboats on our waters, in order to prevent the escape of our slaves. Our citizens, aware of the circumstances by which they are surrounded, will not weigh in golden scales the damages that may result to the owners of slaves, from a relaxation of that degree of diligence which is necessary to secure them against losses. This determination they will carry with them in their jury rooms, and it is not for the courts to weaken or destroy the force of a determination, necessary to protect a species of property which, whether for weal or for woe, has been entailed upon us by those who are now making the most clamor about it.

Judge McBRIDE concurring, the judgment will be affirmed.

NAPTON, Judge.

I am in favor of sending this case back for a new trial, upon the ground that vindictive damages were given by the jury, when the circumstances of the case did not warrant it. The value of the slave, when in Vaughan's possession, was about five hundred dollars, and that value must have been much diminished at the time he imposed himself upon Captain Eaton, by the fact that he was then a runaway, had stolen a horse, and was in possession of free papers which would very much facilitate his escape. The verdict was for nine hundred dollars. It is conceded that Captain Eaton was imposed upon; that he was actuated by no improper motives; that he was guilty of no gross negligence, though he may not have used the utmost diligence. Upon what principle then, shall the jury be told that *if they think* proper they may allow smart money? Neither justice nor sound policy requires the infliction of a punishment upon the defendant, unless his conduct has been such as to deserve censure.

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ALLISON vs. HUNTER.

1. When a patent is issued, by an officer who has authority to issue it, the law presumes that all the prerequisites necessary to its issuing have been complied with; and irregularities in the acts of the officer, cannot be enquired into, except upon a direct application by the U. S. to vacate it.
2. The receipt of a receiver is *prima facie* evidence that the law has been complied with. It does not, however, stand upon the same footing with a patent, and it may be shewn by parol evidence to be void.
3. Land to which A was entitled to a pre-emption right, could not be entered at private sale by B; and A having applied to prove his pre-emption right, and being prevented by the officer under the impression that the land was not subject to a pre-emption, an entry of the land by B while subject to the pre-emption of A is void.
4. A pre-emption right need not be proved up, and a certificate thereof obtained, to enable the party to defend in an action of ejectment.

ERROR to Pike Circuit Court.

CARTY WELLS, for Plaintiff.

The plaintiff in error relies on the following points:

1st. The evidence offered was legal and relevant, and ought to have been given to the jury. Whether sufficient to prove the facts relied on, was for the jury, and not the court.

2d. The facts sought to be proved were sufficient to defeat plaintiff's entry. See the late case of Hill vs. Groom. If the entry was fraudulent it was void; if the land was not subject to entry, it was void; if it was reserved from sale, the entry was void; if it was subject to entry, it was also subject to Watson's pre-emption, which would prevail over the entry.

W. M. CAMPBELL, for Plaintiff.

Allison has given evidence conducing to show that he has a good claim under the pre-emption law, and was in a situation to assail the title of Hunter for fraud.

The receiver's receipt of Hunter, is only *prima facie* evidence of title, and may be avoided by proving that it was obtained by fraud, or was issued in violation of law.

The evidence conduces to prove that Hunter was guilty of fraud, and suppression of the truth, when he took advantage of the absence of

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Wm. Wright, deceived Willis Green, and obtained the certificate of entry, knowing it to be reserved from sale.

The entry is void, because it never did receive the assent of the register, express or implied; but on the contrary, the pretended sale by Green was disapproved of, and repudiated by Wright, so soon as it was known to him, and was also disapproved by the commissioner of the land office so soon as he was informed of the facts of the case. No valid sale was made to Hunter, for the want of assent on the part of the proper officer.

The sale was illegal, and improper, because the land had long been withheld from sale, and could not be properly entered at private sale, until it had been again offered at public sale.

The commissioner of the general land office possesses authority to make rules, and to prescribe the manner in which entries should be made; also to decide when sales shall be suspended, in order to prevent improvident entries, and conflict of titles.

It is the duty of the commissioner of land titles to suspend, and withhold patents, and cancel entries when satisfied that they have been obtained by fraud, or unlawfully issued.

The decision of the officers of the general land office, should not be disregarded by the courts of justice, without strong reasons therefor, because it is much easier for the courts to conform their decisions to the established usages, and regular and settled practice of the land office, than for the land office department to conform its actions to the variant and conflicting decisions of all the courts of the United States, and of the courts of fifteen or sixteen States and Territories, that contain public land.

The concurrent opinions of Messrs. Wirt, Butler, Berrien, Taney, Crawford, and Whitcomb, in relation to fraudulent and unlawful entries, and the powers and duties of the land officers in relation thereto, are entitled to high respect, not only as the opinions of eminent lawyers, and profound jurists, but also because given officially, in conformity to law, to regulate the conduct of the ministerial officers, and to build up and establish a regular system for the disposal of the public lands.

If the land was a part of Dubreuil's claim, then it was not subject to entry; and even if Dubreuil's claim had been decided to be invalid, and the same had again become public land, it would not be subject to private entry, until again offered at public sale.

If Dubreuil's claim was not valid, then the pre-emption claim of Watson, under which Allison claims, was sufficient to hold the land.

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The pretended entry of Hunter was invalid, because Allison had a pre-emption thereon, and it had been previously withheld from sale.

The conveyance from Dubreuil to Watson, of itself, constitutes a good equitable title in Watson, if the claim of Hunter be bad, and having such a title, he is in a position in which he may successfully assail the title of Hunter for fraud and illegality.

In ejectment, a defendant may avoid a deed for fraud. 1 Marshall, 425; 5 Littel, 186.

GLOVER & CAMPBELL, and URIEL WRIGHT, for Defendants.

We insist that the judgment of the circuit court ought to be affirmed. We shall endeavor to establish certain propositions of law and fact in the case, and by the light of these, examine the evidence which the plaintiff in error contends was excluded by the court.

1st. The acts of all public officers performed within the scope of their general authority, are *prima facie* valid; and it is presumed, that all the requisite steps have been taken legally to consummate such acts.

2nd. It follows from this, that if there be any preliminary named in a statute to the performance of such act, which is deemed of sufficient importance to defeat the act if omitted, the burthen of showing such omission, is on the party seeking to avoid the act.

3rd. Conceding the land was never offered at public sale, the entry is not necessarily void. In the exercise of a power conferred by statute, it is not every omission to comply with the provisions of a statute, which will defeat the act of the officer. "Statutes are sometimes directory, and in such case, a breach of the condition works no forfeiture of the act done." 1 Kent. Com. 465. Provisos in a statute, do not always amount to a condition. 2 Cow. & Hughes Dig. p. 1884, c. No.

4. Where a statute directs an officer to do a thing in a specified time, without restraining him against doing it afterwards, the act constitutes no limitation on the power of doing it afterwards. 8 Mass. 230. The essential requisites of a statute must be complied with, or an act done under it will be void: otherwise, where the statute is directory. 5 Hill, 16. Thus, statutes prescribing the manner of proceeding in the collection of debts, as that slaves shall not be seized, and sold under execution, until the remaining personal estate is exhausted; that real estate shall not be sold until all the personal estate is exhausted; that property neither real nor personal, shall be sold until duly advertised,

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have been considered as merely directory in these particulars, and official acts done in contravention of these provisions held valid in favor of innocent purchasers. 3 Bibb, 216, 202, 518; 1 Blackf. 212; 2nd Blackf. 295; 8 Cow. R. 282; 13 Ibid. 11, cited in 4th Kent. Com. 5 ed. note *a*, page 430; 1 Mo. R. 543; 2 Bibb. R. 401; 3 Marsh. 282, 619; 2 J. J. Marsh. 36, 68. There is a distinction between a sale without authority, and one, where there is an authority not strictly pursued. "A purchaser is not bound, or otherwise affected by the irregular acts of an officer, when he has no notice of the irregularity, and does not connive at, or participate in the same. 1 Bibb. R. 155; 1 Mun. R. 95. 3 J. J. Marsh. 439; 4 Mun. R. 465, 474.

It is believed and insisted, that the case at bar falls within the bearing of the cases, and principles cited; and that at most, the requisitions of the acts of Congress, with reference to an offer at public sale before a private entry, are mere prudential directions to the officers of the land department, which may devolve a personal responsibility upon them, but never were intended to create a precedent condition, to a valid disposition of a tract at private entry. The defendant will endeavor to show that this conclusion is inevitable from a general view of the legislation on this subject. See Land Laws, Instructions and Opinions, part 1, act of Congress, May 18th, 1796, p. 50; March 2, 1799, p. 61; March 1, 1800, p. 65; May 10, 1800, p. 72; March 3, 1803, p. 97; March 3, 1803, p. 100; March 26, 1804, p. 107; April 21, 1806, p. 142; Feb'y 21, 1806, p. 130; March 3, 1807, p. 161; Feb'y 29, 1808, p. 163; March 31, 1808, p. 166; June 15, 1809, p. 172; April 30, 1810, p. 176; Feb'y 15, 1811, p. 184; March 3, 1811, p. 192-4; April 26, 1816, p. 273; April 27, 1816, p. 277; April 29, 1816, p. 279; March 3, 1817, p. 288; Feb'y 17, 1818, p. 294; March 18, 1818, p. 297; April 20, 1818, p. 306; March 3, 1819, p. 315; March 3, 1819, p. 318; April 24, 1820, p. 324; March 3, 1823, p. 364; March 3, 1823, p. 370-371; May 26, 1824, p. 384; May 26, 1824, p. 393; Feb'y 19, 1831, p. 481; June 25, 1832, p. 501; July 10, 1832, p. 508; March 2, 1833, p. 516; June 26, 1834, p. 528-9; July 7, 1838, p. 581 and 579.

4th. That if it were otherwise competent to show the fact, that the land had never been offered at public sale, *oral* testimony ought not to have been received in the case; all the considerations of public policy and convenience forbid such a construction of the law, as would have the effect of suspending every land title in the country, prior to the emanation of a patent upon so unsubstantial a foundation. That it has been repudiated in like cases; see 1 Harr. & McH. p. 187; 1 Harr. & John., 349; 2 Har. & John. 132; 4 Har. & McH. 420; 6 Mo. Rep. 106. This

court declare the incompetency of such proof. In the case of Craig vs. Preston. Lit. Sel. C., 141, the supreme court of Kentucky declare, that such a construction of a law of Virginia ought not to be made, as would allow the introduction of parol evidence, to show that a land warrant did not issue in conformity to law.

5th. The power of cancelling an entry with the register and receiver, has never been conferred upon the commissioner of the general land office. 5 Mo. R. 355; 9 Ib. 190-1. The cancelment of Hunter's certificate, therefore, if in fact it has been done, was a lawless act, which the circuit court properly disregarded.

6th. Should we grant the power of the commissioner to cancel by his arbitrary will, without notice, without a jury, without evidence, in the absence of the party, and without any right of appeal to any other tribunal; the best evidence of such cancelment was not offered to the circuit court, and the mere letters of the commissioner were properly rejected. If the cancelment was evidenced by a record of his office, he should have certified it under his official seal. See Public Land Laws, Instructions, and Opinions, part 1, p. 212. If it were a matter *in pais*, Hunter had the right that he should be sworn and cross-examined; in no event could his letters, or the letters of other persons, an almost countless number of which were offered to the court, be received as legal evidence in the case. 5 Wheat. 293.

7th. The confirmation to Antoine Dubreuil of 10,000 arpents, by the act of July 4th, 1836, was not in itself, evidence of anything against Hunter's title; there was no evidence offered to the court that the claim was filed with the proper officer earlier than the 13th Nov. 1811, consequently it was not reserved from sale by the act of Congress March 3, 1811. If it was protected by the act of Congress May 26, 1824, and the acts in continuance thereof, the neglect of the claimant to accept the benefit of said acts, and the expiration of his privilege under them on the 26th of May, 1829, again created a bar which was in full force on the 11th July, 1831, when Hunter entered it. The act July 9th, 1832, could not divest the right which Hunter had acquired, even if it embraced Dubreuil's claim, which is denied, since it was not filed in time. Stoddard and Chambers, 2 Howard S. C. R. 313; 8 Mo. R. 88; 6 Mo. R. 10.

Such being the condition of Dubreuil's confirmation, it was properly treated as a nullity by the circuit court; it was not even pretended that it was filed in time to be embraced either by the act of March 3, 1811, or the act of July 9, 1832. After the rejection of the supposed confirmation, the offer of Dubreuil's title bond, or even his deed, without any

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explanation, would have been properly rejected. *Hart vs. Rector*, 7 Mo. R. 531.

8th. The certificate of N. P. Taylor, register of the land office at St. Louis, was offered in evidence for the purpose of showing that in 1818, the claim of Dubreuil was certified to his office for some purpose by Frederick Bates, recorder of land titles. If this certificate was evidence at all, it was but secondary evidence; and no ground-work being laid for its introduction, it ought to have been excluded from the jury.

The fact that the claim was on file in Bates' office in 1818, certainly did not even tend to prove that it was there prior to the 1st July, 1808, the last day on which it could be filed. The evidence of a filing should have come from the recorder's office, and nothing but a certified, or sworn copy of the certificate of filing, was sufficient, while presumption of its existence remained. In 3 Philips, p. 1065, note 720, it is stated that a copy of a copy is not evidence. This is a copy of a mere abstract.

9th. Oral testimony of the supposed right of pre-emption in Watson, was in the manner it was offered, properly rejected.

"Secondary evidence cannot be given, until all reasonable means of procuring the primary evidence are exhausted." 1 Philips' Ev. 454. The loss or destruction of documentary evidence, is always a pre-requisite to be established to the satisfaction of the court, before any proof of the existence, or contents of the document is permitted to go to the jury." 16 John. R., 8 Mo. R. 116. "The proper depository must be diligently and thoroughly searched." "When the last instrument has been traced into the hands of an individual, he must be subpœnaed." "That he said he could not find it, is not sufficient." "He must have searched for it, in such place as it might reasonably be expected to be found; and must himself be called to prove the search, and that it was ineffectual." If the person is dead, a similar inquiry and search must be made among those who succeeded to his papers, or might otherwise be supposed to have come to possession of the last document. 1. Philips' Ev. 456; 6 T. R. 236; 3 Ib. 1223. It was the duty of the court to determine, whether there was sufficient evidence of the loss, or destruction of the record of Watson's pre-emption right; it will appear that the evidence on this point was wholly unsatisfactory, and the court committed no error in refusing to let the matter offered, go to the jury.

10th. The testimony on the subject of the pre-emption right of Watson, was properly excluded on other grounds. The act of May 29, 1830, expired in one year from its date, and with it, as we contend, the

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rights of Watson. See Public Land L., Instructions and Opinions, p. 1. p. 474. It is not pretended, that any proof was filed until the 21st Sept. 1832. The plaintiff in error seeks to remove this objection by oral testimony, that had the officers of the United States done what he conceives to have been their duty, he could have produced evidence of a right derived from the law. In other words, his title is based, not on what the United States have done, but what they should have done. This court has always refused upon the soundest considerations, to recognize such doctrine. 9 Mo. R. p. 185. Again. The act of congress May 29th 1840, contemplates that payment should be made on filing proof under it, and on failure, the right was forfeited. See Pub. Land L., In. & Op., P. 2, p. 547; Ib. 559-555-6; and here again this court will be called upon by the plaintiff in error, to decide and enforce what would have been the right of Watson, had the register and receiver done their duty. See 13 Peters, p. 515; See act Congress, July 2nd, 1836. Again. If it was legally competent for the register and receiver, on the 21st Sept. 1832, to allow the right of pre-emption claimed by Watson, in virtue of the act 29th May, 1830, and after the expiration of that act, it could only have been upon strict compliance with its provisions; a tender of payment, at the filing of his proof, was absolutely necessary; for the want of this his right became forfeited.

Lastly. Watson forfeited his right, by selling his right in violation of the provisions of the Statute, and removing out of the State prior to paying, or offering to pay for the land. 2 Public Land Laws, Ins. & Opins. p. 117, No. 77. The defendant denies the legal validity of this instruction, in attempting to extend the provisions of the law beyond the time fixed in it. But if they were legal, the right was not saved under them.

11th. Allison having shown to the court no legal evidence of an outstanding title in any one, it must be presumed that no such title exists, and that he can oppose nothing but a mere naked possession to the plaintiff's title. Will he be permitted in this state of the case to assail the plaintiff's entry for fraud? We think not. 6 Mo. R. p. 106. He could not do so, even if he had entered the land. See 1 S. C. R. 156; 3 Ib. 99. This court have decided, in 9 Mo. R. 182, that after patent has issued, they will decree the legal title out of the patentee, in favor of him who holds the superior equitable title; but that they will not decree the mere equity. The reasons of that case appear to apply with equal force to an action at law, where there are conflicting entries, and urge us to the conclusion, that in such case the oldest entry should prevail till the patent issues. 1 S. Car. R. 160. But however this may be, it

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taken advantage of by a third person. But while we say this, we do not maintain that a settler on the public lands can be expelled without authority of law. It is not sufficient that he who would turn another out of his home, should only produce a written formula. A certificate of entry, which has a mere physical existence, is no more than a blank page of the Alcoran, unless it is warranted by law. Unless the officer has authority to give it, it may be shown to be a nullity whenever it is set up to affect the rights of any one. A receiver's receipt does not stand upon the same footing with a patent. A patent confers a perfect legal title. When a party is in under it, no higher title can emanate from the government to disturb him. A receipt is an authority to demand a patent; it is strictly scrutinized, and if not warranted by law, it is disregarded, and not suffered to be made the foundation of a legal title. If a certificate is cancelled by the commissioner of the general land office, his judgment is not conclusive on this court in a contest between titles like those now before us; but when we find his act warranted by law, why endeavor to thwart it? Why put one into possession of land at the expense of another, when it is apparent that no title will ever be conferred on him, and when we can see that it is right it should be so? 5 Black. 55.

It is of importance that some control should be retained by our courts over the conduct of the land officers. It would be unwise to proclaim from this tribunal that they may act as they please towards the settlers on the public lands, and that courts will give full scope and effect to their lawless designs. Such a principle would encourage them to oppression. The consciousness that their acts could not be made bare, and their motives exposed in a court of justice, might incline them to listen to the entreaties of a speculator, who would expel a poor man from his home, and rob him of the sweat of his brow. It is useless to say that such conduct would meet with its deserts from the federal government. That government is too remote, and approached with too much difficulty by the great mass of those who would suffer by the misconduct of the land officers, to be looked to for protection; and moreover, the settlers having been expelled from their possessions, would deem it preferable to go and seek other homes, than to be spending their scanty means in litigation.

Can the validity of this certificate comport with the existence of the pre-emption right of Watson? for, as evidence was offered to prove that Watson, at the time of Hunter's entry, was entitled to a pre-emption under the act of 29th May, 1830, it must be assumed for the purposes of this argument that such was the fact. Then, according to the

settled construction of that law by the officers of the general government, and the courts of the western country, that entry was invalid; *Mosier vs. Smith*, 5 Black. 55; *Isaacs vs. Steele*, 3 Scam. 101. But it is said that the pre-emption right, not having been proved up before the expiration of the law, and a certificate thereof obtained, no right can now be asserted under its provisions. Let it be remembered that an offer was made to prove the pre-emption in time, but the claimant was not allowed to do so, because the land was reserved. Now if Hunter could enter, it is clear that Watson was entitled to a pre-emption. Even if the land was not subject to private entry, yet Watson held a pre-emption on it, when it was ascertained that it was not a private claim. Hunter has entered the land, and his title can only be supported by the assertion of a state of facts which show that, at the time of his entry, Watson was entitled to the land. If Watson was prevented during the existence of the law, from proving his pre-emption, his inability to do so, could have no effect in giving validity to an act which could not legally be performed. The injustice of the officers, in refusing him permission to prove his right, cannot give efficacy to the void entry of Hunter. Watson never abandoned his right; he did all he could to perfect it, but was prevented by those who afterwards illegally permitted Hunter's entry. It may be said that a pre-emption right can only be evidenced by the certificate of the register and receiver, and there being no such evidence here, its existence is not legally shown. Our statute gives a right to maintain an action of ejectment on a pre-emption right. Of course, then, a pre-emption right will defend an ejectment against one not having a better right. It is well settled that the pre-emption act of 29th May, 1830, gave a right of pre-emption to lands subject to private entry, and that act continued in force one year, during the whole of which pre-emptors might prove their claims.

If a pre-emption alone, without any other evidence than the facts necessary to confer it, could not be set up as a defence against a certificate of entry, the benefits of the law would be entirely lost to those who settled on the lands subject to private sale; and a statute that was designed to give the poor, whose means had been exhausted in coming to the country, a little indulgence to enable them to pay for their homes, would be rendered a dead letter. If the entry can prevail over a pre-emption, unless shown to exist by a certificate of the register and receiver, then every pre-emptor would be compelled to prove his claim immediately in order to defend himself, or otherwise lose it; and thus a construction is put upon the law which takes away every advantage proffered by it. The idea of a statute being a title paper, is not novel

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in our jurisprudence. Many persons in this State hold their lands by act of Congress alone. The claimants under the act of 13th June, 1812, required to prove their titles to their lots, rest on the statute, and show the existence of those facts which are necessary to bring them within its provisions. So of those claiming under the act of confirmation of the 29th April, 1816. If the pre-emptor is prevented by the officers of government, or other causes beyond his control, from proving his claim during the existence of the act by which it is conferred, and clearly manifests a determination not to abandon by declaring a private sale, made under such circumstances, void, we do justice between the parties and conform our course to that which will be pursued by those in whose hand is the final disposition of the public lands. What measure of justice or policy can be subserved in lending our assistance to this plaintiff, whose title paper has been cancelled by the government, and who is assured he never will receive a title against one who is in possession, and whose claims are more meritorious?

Judge McBride concurring, the judgment is reversed.

NAPTON, J., dissenting.

Hunter brought an action of ejectment against Allison in the circuit court of Pike county. Upon the trial, Hunter produced in evidence a receipt from the receiver of the land office at Palmyra, for the purchase money of the land in controversy, and proved the defendant Hunter in possession of the land.

The defendant then offered evidence, both oral and documentary, to prove:

1. That the land was reserved from sale.
2. That at the time of the plaintiff's entry, the land in controversy had never been offered at public sale, and consequently was not liable to private entry.
3. That the land in controversy was within the limits of the claim of Antoine Dubreuil, confirmed by act of Congress of 4th July, 1836, and that defendant derived title from Dubreuil.
4. That one Elihu Watson had a pre-emption right on the land, under the act of 29th May, 1830, and that said right had been conveyed by deed to said defendant; and
5. That said entry was fraudulent and illegal.

This proof was all rejected by the circuit court, but from the documents, and testimony of witnesses preserved by the bill of exceptions, the facts appear to have been as follows:

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On the 11th of July, 1831, Hunter, the plaintiff, entered the east half of the S. E. qr. of S. 8, town. 58, R. 1. The register of the land office was absent at the time, but had left blank applications, with his signature to them, in charge of the receiver, so as to enable the business of the office to be transacted in his absence. The register was a witness on the trial, and testified that Hunter, or his agent, had applied to him to enter the land, but that he had informed him it could not be entered, because of a private claim indicated on the maps in his office by feint pencil marks. The register states that, had he been present, he would not have permitted the entry; but he had gone to St. Louis on business, and was absent some ten days.

Elihu Watson had settled on this land in 1823. In December, 1830, he applied to the land officers for permission to prove up his pre-emption, under the act of May 29, 1830, but was refused, because of its being within the claim of Dubreuil, and consequently not subject to pre-emption. In September, 1832, the commissioner of the general land office, directed the register and receiver to take the proof of Watson's pre-emption, *nunc pro tunc*, and it was accordingly done, but not left on the files of the office. Watson, in 1835, sold his pre-emption right to the defendant Allison, and subsequently left the State. There was no proof offered of any title to Watson, either by certificate or patent, emanating from the United States.

On the 4th July, 1836, the claim of Antoine Dubreuil was confirmed by act of Congress. The 2d section of that act provided, "that if it shall be found that any tract or tracts confirmed as aforesaid, or any part thereof, had previously been located by any other person or persons under any law of the United States, or had been surveyed and sold by the United States, this act shall confer no title in opposition to the rights acquired by such location or purchase."

The defendant also claimed to have a derived title from Dubreuil.

It did not appear from the proof actually offered on the trial, whether this claim of Dubreuil was one of those which had been duly filed with the recorder, so as to be within the reservation of the act of Congress of 1811. But I assume that it was so filed, from the fact that the claim was acted on by the first board of commissioners.

There are three principal points arising in this case, all of which have been fully discussed at the bar, and each of which I propose to notice very briefly, to-wit:

First. The claim of Dubreuil,

Second. The pre-emption right of Watson, and

Third. The title of Hunter by his entry of 11th July, 1831.

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1. On the 18th January, 1834, the commissioner of the general land office communicated to Congress the reports of the boards of commissioners, made under the act of 9th July, 1832, and the act of 2d March, 1833, and the action of Congress on these reports resulted in the act of July 4, 1836, confirming most of the claims, in favor of which the commissioners had reported.

In the report of the board, made on the 27th Nov., 1833, (Ex. Doc. 24th Cong., vol. 3, doc. 50,) the following statement and suggestions are made by the commissioners:

"Upon the subject of conflicting claims, we have been unable to ascertain to what extent they exist, &c., &c. We are of opinion, however, that they exist to a considerable degree. There are numerous cases of lands lying within these French and Spanish claims, belonging to individuals whose right or claim originated under the government of the United States; some depend upon purchases; some upon the law allowing pre-emption; some others upon New Madrid locations; and some again upon settlement rights which have been confirmed. Most of these persons have been for a long time settled on their lands. Their claims being of a *bona fide* character, derived from the government of the United States; they went on to improve their lands, making for themselves and families comfortable homes, without any belief that they ever would be interrupted in their possessions. Should the claims reported by the board be confirmed by Congress, in whole or in part, Congress will, in their wisdom, no doubt, notice the suggestion here made, and carve out such a course as will quiet the uneasiness and anxiety which are felt, by doing everything which even the most scrupulous demands of justice could require."

It was, doubtless, in conformity to these suggestions that the second section of the act of July 4, 1836, was framed, by which the rights of those who had located or purchased the confirmed claims, or any part thereof, by virtue of any law of the United States, were left unaffected by the act.

In the case of *Stoddard vs. Chambers*, 2 Howard 284, the Supreme Court of the United States, have held New Madrid locations not to be within the protection of the second section, unless located or patented during the interval in 1830 and '31, when the reservation by the act of 1811, did not operate. This opinion was based upon the principle that New Madrid locations placed upon lands reserved by act of Congress, were mere nullities—not voidable, but absolutely void. This court in the case of *Sarpy vs. Papin*, gave a different construction to that portion of the second section which relates to sales, relying on the be-

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lief that the act was not designed to give any title, in opposition to *actual bona fide* sales by the government, or its officers, whether those sales were authorized by law or not. When we consider the fact that these Spanish claims had been repeatedly rejected by the various boards of commissioners and public officers to whom they had been referred by the government from 1805 up to 1832, as utterly destitute of any merit; that they had been barred from time to time by various acts of Congress until revived by the act of 1824, and afterwards by the acts of 1832 and 1833; that the action of the officers of government in relation to these claims, had been exceedingly contradictory and inconsistent; at times allowing locations and sales; at other times refusing them, according to the caprice of the officer, or of the department to which he belonged; and that in point of fact, hundreds of sales and locations had been made within the limits of these claims, the purchase money of which was in the coffers of the government; and that these innocent purchasers, unsuspecting of danger, and lulled into security by the action of the government, had settled on the lands so purchased, in good faith, and made extensive and valuable improvements. When we look at these facts, notorious here, and communicated by the commissioners to Congress, is it unreasonable to suppose that Congress, in passing the second section of the act of 1836, designed something more than a mere mockery of protection? If the sales and locations were made in accordance with law, the purchasers needed no protection. Congress could not deprive them of title. What motive could have operated on Congress to protect those purchasers who happened to make their entries, or get their patents, between the 26th May, 1830, and the 9th July, 1832, and leave those who had located or purchased from 1818 up to 1836, unprotected? There was no particular merit in the entries and locations made at this interval, except that it so happened, probably without the knowledge of the officers or purchasers, that the reservation of the act of 1811, was at this period inoperative.

The decision of the Supreme Court of the United States *in terms* extends only to New Madrid locations; whether the same doctrine will be applied to entries at the land offices, does not appear. The entry of Hunter was made on the 11th July, 1831. At this time the land was not reserved from sale, and therefore the rule in *Stoddard vs. Chambers*, protects this entry from any title acquired by virtue of the act of 4th July, 1836. So far, then, as the Dubreuil claim is concerned, I see no ground of objection to its exclusion by the circuit court.

2. The pre-emption right of Watson, if it had been proved and allowed in time, I should consider a sufficient title for the defence of this

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action. It may be further admitted that if the officers had permitted the proof of this pre-emption to have been taken subsequently to the expiration of the act of 1830, and the pre-emption right had assumed a tangible shape, either by entry or patent, it would have avoided the entry of Hunter. But an entry of land subject to pre-emption, is not void; it is merely voidable. The pre-emptor may never claim his pre-emption, and in that event the title of the purchaser has never been questioned. This was the uniform construction given by the land department to the pre-emption law of 1830. The government has not allowed Watson's pre-emption; it has not permitted him to enter the land or given him any evidence of title. It does not appear that his rights ever will be recognized; they have, in fact, been forfeited by reason of the sale to Allison.

In an action of ejectment, such a title resting on an abandoned and forfeited equity, constitutes no solid foundation upon which to base a defence.

3. The defendant offered to show the illegality of Hunter's entry, *first*, by proving that the land had never been offered at public sale, and therefore was not subject to private entry; and *second*, by showing fraud.

Whether the register and receiver at Palmyra, ever complied with their duty in offering this land at public sale, before they permitted it to be purchased by private entries, is, in my opinion, a matter of no consequence whatever. It is a regulation of the department, and, unquestionably, a very wise and salutary one, conducing to the interest of the purchasers, as well as of the proprietor, that reserved lands when brought into market shall first be offered at public sale, before private entries are permitted. But even if this were a regulation by act of congress, and not resting on the mere usage of the agents of government, it would be only directory, and the validity of a sale would not be questioned, though made in contravention of the regulation. It would produce a fearful instability in the land titles of this State, if the customary evidences of such title, the certificate of entry or the patent, could be successfully defeated, by showing that the agents of government who superintend these sales, have neglected to perform all the duties which the law prescribes. Had it been contemplated that a compliance with this regulation should be considered as an essential prerequisite to the emanation of a valid title, it is remarkable that congress has not provided any means by which the fact can be ascertained. There is nothing in the records of the register's office, nothing in the records of the department at Washington, by which the fact can be as-

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certained whether this land had ever been put up at public sale or not. Indeed we have on the record a voluminous correspondence between the heads of department and subordinate officers, from which an unsuccessful inquiry seems to have been instituted to ascertain this fact. It does appear, however, from a statement filed in the surveyor general's office, that entries upon this land, which is said to have been reserved and never offered for sale, were in fact made *during nearly every year from the year 1818 up to the year 1844*, amounting in all to *fifty-eight* entries. *Twenty* of these entries have been *patented*. *Nine* of them were made in the year 1831, one of which was on the 4th July of that year, and another on the 1st day of August, and a third and fourth on the 24th and 29th June. In short, entries were made in the months of April, May, June, July, August and December, 1831, and the entries made in the months of April and June are marked *patented*. Yet it is said that this land never was offered for sale, and the register, who was a witness in the case, is unable to give any satisfactory information on this subject, but says that had he been at the office on the 11th July, 1831, Hunter should not have been permitted to make his entry. Entries were permitted on the 24th, 25th and 29th June, and the 4th July and 1st August, 1831. The register might have refused to permit Hunter's entry on the ground of Watson's pre-emption, and very properly; but I see no reason for the refusal arising from the reservation of the land, or the failure to make public advertisement, which would not apply to all the other entries which appear to have been permitted during that year.

The defendant also offered to prove that Hunter's entry was fraudulent. That fraud vitiates the most solemn contracts, has become a maxim of the law; but it is difficult to conceive of any fraud which could affect the character of this transaction. If the sale was legal, it matters not how fraudulent may have been the motives or conduct of either the officers or purchaser. The fraud attempted to be proved in this case, was that Hunter took advantage of the register's absence, who had previously rejected his application, to make the entry. If the rights of any one else had been affected by this transaction, the person prejudiced might complain, but the pre-emptor, Watson, it seems, had met with the same fate as Hunter, and never succeeded in getting any title. His interests, if he has any now, are not in a shape to be available in his action.

The judgment of the circuit court was, in my opinion, correct.

P. & J. Powell vs. Adams.

P. & J. POWELL vs. ADAMS.

1. In an action upon an assigned note, it is only necessary for the plaintiff to offer *prima facie* evidence of the assignment, to entitle him to read the assignment in evidence to the jury.
2. Proof that the maker had admitted the assignment, is sufficient evidence to authorize the plaintiff to read the assignment in evidence.

ERROR to Platte Circuit Court.

SCOTT, J., delivered the opinion of the court.

This was a suit by petition and summons, against Adams, on a promissory note given to Benjamin Gragg, and by him assigned to P. & J. Powell, who were plaintiffs below, and plaintiffs in error in this court. The plea was *nil debit*, on which issue was joined.

On the trial, the plaintiffs offered to read the note in evidence, after giving the following evidence of the assignment. A witness showed the note to the defendant, who admitted the assignment of Gragg, and on being required to state the language used by Adams, said he had frequently conversed with the defendant in relation to the note, prior to the time when it was shown to him, and he believed, before he received the note. That from the conversation, the first impression received was that Gragg was a joint obligor with Adams. When the note was shown to Adams, the witness asserted that he had given it to Gragg, and that Gragg had assigned it to the plaintiffs. Adams replied that was the way it was executed. Adams had the note in his hands, and examined both face and back, and the credits endorsed on the back, and said he would pay it. Nothing was said by defendant about the hand-writing of Gragg. The court refused to permit the note to be read in evidence, to which an exception was taken; the plaintiffs thereupon submitted to a non-suit, and afterwards moved to set it aside, which being overruled, they have brought the cause to this court.

When a question as to the existence or loss of a written instrument incidentally arises in the progress of a trial, as for instance on the application of a party to be permitted to give parol evidence of the contents of such instrument, the court, and not the jury, pass on the fact of loss. But if the question is involved in the issue of a cause upon the merits, it is a matter for the jury to settle. *Harris vs. Wilson*, 7 Wend. 57. So, it is said, that if the genuineness of a deed is the fact in

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question, the preliminary proof of its execution given before the judge, does not relieve the party offering it, from the necessity of proving it to the jury: the judge only decides whether there is *prima facie*, any reason for sending it at all to the jury. If, however, the question of fact in any preliminary inquiry, such, for instance, as the proof of an instrument, is decided by the judge, and the same question of fact afterwards recurs in the course of the trial upon the merits, the jury are not precluded by the decision of the judge, but may, if they are satisfied upon the evidence, find the fact the other way. Greenleaf, 58, 472. Ross vs. Gold, 6 Greenleaf. Commissioners of Berks county vs. Ross, 3 Bin. 539. It results from these principles, which are unquestionably sound, that the assignment of the note being the matter in issue, it was only necessary to produce *prima facie* evidence of the fact to the judge who would then let the jury pass upon it, and determine whether it was sufficient to establish its existence. We think the evidence given was amply sufficient to have induced the court to submit the fact of the assignment to the jury.

The other Judges concurring, the judgment will be reversed and the cause remanded.

EDGAR vs. McCUTCHEN.

The case of *Hanna vs. Adams*, 3 Mo. R. 160, overruled.

In an action of slander, the meaning of the word "*fuck*" need not be averred. Although lexicographers may be too modest to give its definition, it is nevertheless an English word, the meaning of which is well understood.

APPEAL from Washington Circuit Court.

Scott, J., delivered the opinion of the court.

McCutchen sued Edgar for slander. The slanderous charge was carnal knowledge of a mare, and the word "*fuck*" was used to convey the imputation. After a verdict for the plaintiff, a motion made in arrest of judgment, for the reason that the word used to convey the slander, was unknown to the English language, and was not understood by those to whom it was spoken; and the case of *Hanna vs. Adams*, 3 Mo. Rep. 222, amongst others, was cited. The motion was overruled, and Edgar appealed.

Ex-parte Cain.

PER CURIAM. Because the modesty of our lexicographers restrains them from publishing obscene words, or from giving the obscene signification to words that may be used without conveying any obscenity, it does not follow that they are not English words, and not understood by those who hear them; or that chaste words may not be applied so as to be understood in an obscene sense by every one who hears them.

All the Judges concurring, the judgment is affirmed.

EX-PARTE CAIN.

Under the act of 27th February, 1843, supplementary to act concerning costs of same date, a prosecutor is not liable for costs in any capital case, or in any case punishable by imprisonment in the penitentiary alone.

APPEAL from Franklin Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was a petition to the circuit court of Franklin county, for a writ of prohibition against two justices of the peace, who had entered up judgment against the petitioner for the costs of a criminal prosecution which he had instituted before said justices.

The circuit court caused a conditional rule to be entered, requiring the justices to appear and show cause why the judgment for costs against the said Cain should not be set aside, &c. Upon the return day of the rule, the justices appeared and showed cause, and the rule was discharged, and costs adjudged against the petitioner.

It appeared from the docket of the justices, that Cain made affidavit before them, charging one Watts with hog stealing; that a warrant to arrest the said Watts was thereupon issued; that said Watts was arrested, examined and discharged, the justices making upon their docket the following entry: "The court consider that the charge is not sustained by the plaintiff, and that it is a malicious prosecution; therefore judgment is rendered against Jesse Cain, prosecutor, for the sum of — dollars, &c., for costs."

The circuit court being of opinion that judgment against Cain for the costs was properly rendered, the petitioner excepted, and brings the cause here by appeal.

Vaughn vs. Lynn.

By the 13th section of the act of Feb'y 27th, 1843, it is provided, that "in all prosecutions before a justice for a criminal offence, where the justice discharges the accused for want of sufficient proof, the justice, if he believes there was no good cause for the prosecution, shall enter judgment for the costs against the prosecutor."

By a supplemental act, passed on the same day, it is provided, that the act above referred to, shall not be construed so as to make the informer in any capital case, or any case punishable by imprisonment in the penitentiary alone, liable for the costs. Sess. Acts 43, p. 35.

Hog stealing is declared grand larceny by our statute, and punished only by imprisonment in the penitentiary.

The judgment of the circuit court is therefore reversed, and the cause remanded.

VAUGHN vs. LYNN.

Where a parol agreement has been entered into between A and B, and A subsequently takes from B a higher security, the law presumes the parol contract to be merged.

APPEAL from Benton Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was an action of assumpsit brought by Vaughn against Lynn, upon a parol agreement that in consideration that said Lynn had become tenant to the said Vaughn for a year, of a certain farm, said Lynn had agreed to pay the plaintiff two barrels of corn per acre, for about fifteen acres, and one third of all the oats raised on the farm, to be delivered in the stack; and also to tend the same in a husbandlike manner, and keep the same in good repair. The declaration alleged a breach of contract in all these particulars, and laid the damages at three hundred dollars.

The defendant pleaded non-assumpsit. On the trial, the plaintiff proved that in the month of January, 1843, the plaintiff rented his farm to the defendant, (having recently purchased it of defendant,) and the defendant agreed to cultivate it well, and pay two barrels per acre for the small fields, (about fifteen acres,) and one third of the oats raised on the remainder of the farm, which defendant had not rented out

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previously to the sale to plaintiff; the oats to be delivered in the stack.

Defendant tended the land in corn and oats, but owing to the season, and the character of the soil, the crops, both of corn and oats, were not very abundant.

Plaintiff also proved a demand of the rent. The defendant then called for an instrument of writing in possession of the plaintiff, which was as follows, "I, James Lynn, having heretofore rented of W. L. Vaughn the place on which I now reside, agree to pay said Vaughn, or his assigns; two barrels of corn per acre, for the small field, and one-third part of all the oats, to be delivered in the stack, and do assign to said Vaughn the rent, which is one-third part of the wheat now growing on the place. Witness my hand and seal, this 28th May, 1843.

JAMES LYNN." [Seal.]

The court instructed the jury, that the instrument offered in evidence did not discharge the verbal agreement further than related to the payment of rent, and therefore the jury were at liberty to find damages for the non-performance of any other portion of the parol agreement.

The jury found a verdict for the defendant; a motion was made for a new trial, and overruled; exceptions having been duly taken to the several opinions of the court, the case is brought here by appeal.

The plaintiff in error contends that the sealed instrument, executed by Lynn, did not merge the previous parol agreement, or deprive Vaughn of his right of action thereon, unless the former was accepted by Vaughn as a satisfaction of the same. We understand the law to be that where the creditor takes from the debtor himself, and not from a third person, a higher security, such higher security is presumed to be an extinguishment of the original demand. Where the higher security is taken of a third person at the time of making the original contract, or afterwards, in satisfaction of the debt, it is also extinguished. In the absence of all proof of intention, the above we understand to be the legal presumption, and we therefore see no ground for objection to the opinion of the circuit court.

But the plaintiff also objects that the circuit court considered the parol agreement as only in part extinguished by the bond, and therefore permitted the jury to enquire of the damages which the plaintiff may have sustained by reason of a breach of this portion of the contract. Whether the court was correct in this opinion, or not, it is very obvious that it is no ground of complaint for the plaintiff here.

There was, in truth, no evidence, (at least the bill of exceptions

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shows none,) to sustain the plaintiff's declaration in this particular; the plaintiff's own witnesses stated that the land was cultivated as well as it could have been that season.

Judgment affirmed.

FREEMAN vs. FREEMAN & CHALLIS.

This was a bill in chancery, filed by the wife against her husband, and the adm'r of her father's estate. The bill alleged that the father of complainant had by deed conveyed to the complainant, as her separate property, for her separate use, three slaves: that she had taken possession of said slaves, and hired them out, but that her husband had obtained possession of them, and held them as his exclusive property, and had "given out in speeches" that he intended to sell said slaves and convert the proceeds to his own use. The bill also stated that her father had devised to complainant and her sister several other slaves; and that her said husband had stated that on a distribution of the estate, he intended to get possession of the slaves, "and run them out of the State." It prayed the appointment of a trustee, &c.

Held,

1. That the husband is at law the trustee of his wife's property, unless the instrument vesting the property in the wife, appoint another trustee, &c.
2. That the bill shews no ground for the interference of a court of equity. It is not alleged that the husband is insolvent, or the property such as could not be compensated in damages.
3. The bill does not allege that the complainant believes the husband will carry his threats into execution.

APPEAL from Boone Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was a bill in chancery by Mary Ann Freeman, against her husband Jonathan Freeman and Hezekiah Challis, administrator of the estate of Moses Webb, deceased.

The bill states that Moses Webb, the father of the complainant, on the 2d January, 1842, in consideration of love and parental affection, granted by deed to the complainant, for her separate use, three slaves. The complainant further represents, that since the death of her father, she took possession of said slaves, and hired them out as her separate property, but that her husband, the defendant, has since obtained pos-

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session of them, and continues to treat them as his exclusive property. The complainant further states, that her said husband has "given it out in speeches," that he intended to sell said slaves and convert the proceeds to his own use, so as to destroy complainant's right of disposition over the slaves.

The bill further states, that said Moses Webb, by his will, which has been since his death admitted to probate, bequeathed his property to the complainant and her sister, Polly Gray, in equal moieties, upon the following conditions, to wit: that complainant and said Polly Gray, enjoy the benefit of his slaves during their natural lives, and at their death said slaves should go to their lawful heirs, if any; but if the said complainant and the said Polly Gray should have no lawful heirs of their bodies, then the said slaves to be set free. It is further stated, that Hezekiah Challis is the sole administrator of this estate: that Moses Webb left several slaves, one half of which complainant alleges is her separate property: that the estate is not in debt. The complainant charges that said Jonathan Freeman has on several occasions stated to the complainant and divers other persons, that he intended, upon a distribution of said slaves, to get them in his possession and "run them out of the State," and so to defeat the rights of the complainant, and the contingent rights of the slaves themselves.

The complainant further states, that said Moses Webb did not, either in the deed or will above mentioned, appoint a trustee to manage the separate interests of the complainant; and it is charged that the conduct of said Freeman shows him to be unworthy of the trust: therefore prays the appointment of a trustee, &c.

To this bill there was a demurrer, and the demurrer was sustained by the circuit court.

The deed and will of Moses Webb are made exhibits in the cause, and the question has been made at the bar, whether the complainant takes a separate estate in the slaves; but any opinion upon this point we deem unnecessary. Assuming that the slaves are the separate property of the complainant, the bill does not make out a case authorizing the interposition of a court of chancery. The husband is by law the trustee for the management of his wife's separate property, unless the instrument creating it has constituted another such trustee; *Hamilton vs. Bishop*, 8 Yerger, 33. There can be no doubt of the right of a court of chancery to interfere where there has been waste or mismanagement of the fund, and the trustee is not responsible. The complainant, whilst she alleges that her husband has threatened to sell or *run off* her slaves, does not state that she even believes that he will ever carry his threats

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into execution, nor that he is not fully responsible in the event that he does. Jonathan Freeman is not alleged to be insolvent, or likely to become insolvent; nor does the complaint aver that the property has any peculiar value, which would render *damages* no compensation to her for its loss.

This bill is not based upon the complaint of any inadequate provision for the wife, or to compel the husband to make a suitable provision before he shall be permitted to get possession of the separate property of his wife. It is in the nature of a bill *quia timet*, but alleges neither insolvency nor any apprehension of insolvency.

Decree affirmed.

HEATH, USE OF BROWDER, ADM'R. VS. POWERS.

A bond or note not negotiable by delivery, which is transferred by delivery, may be paid by the maker after the transfer, before notice of the transfer given by the equitable assignee.

ERROR to Benton Circuit Court.

RICHARDSON, for Plaintiff.

The plaintiff seeks here to reverse the judgment of the court below, and will urge that it can only be sustained upon the hypothesis, that either, or both of two following propositions are true, to wit:

1st. That the party for whose use this action is brought, had no interest in the subject matter of the decree.

2nd. That he is bound by the decree, to which he was not a party.

The plaintiff by his counsel will respectfully attempt to establish the negative of the two propositions just stated, by maintaining the affirmative of the three following propositions.

1st. That the party for whose use this action is brought, had an interest in the subject matter of the decree. A delivery of a note amounts to an equitable assignment thereof. *Heath vs. Hall*, 4 Taunt. 326. *Canfield vs. Morgan*, 12 John. 346. *Ford vs. Stuart*, 19 John. 342; 24 Pick. 261. *Singleton vs. Mann*, 3 Mo. R. 326. *Himes vs. McKinney*, 3 Mo. R. 270. *Frasier vs. Gibson*, 7 Mo. Rep. 271.

2nd. The person for whose use this action is brought having an interest, he ought to have been made a party to the chancery proceedings; all persons are to be made parties who are either legally or equitably

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interested in the subject matter, and result of the suit, however numerous they may be." 2 Story's Equity, 741-2; Mitford's Eq. Plead, 220; Clark vs. Long, 4 Randolph, 451; Mallow vs. Hinde, 12 Wheat. 194; Finley vs. U. S. Bank, 11 Wheat. 304; Conn vs. Penn, 5 Wheat. 424; West vs. Randall, 2 Mason C. C. Rep. 181; Haines vs. Beach, 3 John. Ch. R. 459.

3rd. That Browder, for whose use this action was commenced, having an interest in the result of the chancery suit, and not being a party thereto, is not bound by the decree made therein. McCord's heirs vs. McClintock, 5 Littell, 304; Finley vs. Bank U. S., 11 Wheat. 304; Haines vs. Beach, 3 John. C. R. 459; Turpin admr. vs. Thomas, 2 Henning & Munford, 139. "An assignee not affected by a decree to which he is not a party." Paine C. C. Rep. 549; Peters' Digest, 539; 1 Wash. C. C. 417; 1 Brock. C. C. Rep. 126; Watson vs. Spence, 20 Wend. 260.

The holder of a junior mortgage is not bound by a decree of foreclosure to which he was not a party, although the senior mortgages had no notice of such claim. Cooper vs. Martin, 1 Dana 25; Brown vs. Wyncoop, 2 Black, 230; 5 B. Mon. 273.

LEONARD & BAY, for Defendant.

1st. The replication is defective, in not setting out the consideration for the transfer and delivery of the bond; the averment that the transfer was "*for value received*," is insufficient; the law will only protect the equitable interest of an assignee of a chose in action, where the assignment is for an adequate consideration, and the nature of the consideration must be set forth, so as to enable the court to determine whether it is adequate. Perkins vs. Parker, 1 Mass. 117. De Forest vs. Frary, 6, Cowen, 155.

2nd. The replication is also defective in not averring that the defendant had notice of the transfer of the bond. It is the duty of a party claiming an equitable interest in a bond, to give notice to the obligor. The title of an equitable assignee is not perfect in equity, until notice is given to the debtor. 2 Story's Equity, secs. 1047, 1056, 1057. Wood v. Partridge, 11 Mass. 487. Comstock v. Farnum, 2 Mass. 96. Dawson v. Coles, 16 John R. 52. Chiles v. Corn, 3 Marsh, 230.

3rd. The decree of a court of chancery, although it may not affect the rights of those who were not parties, yet is binding and conclusive with respect to the subject matter on which it acts. McCall v. Harrison, 1 Brock. C. C. R. 126.

Heath, use of Browder, Adm'r, vs. Powers.

NAPTON, J., delivered the opinion of the court.

This was an action of debt brought by R. B. Heath, to the use of Browder, administrator of Jonas Heath, deceased, against Powers, on a bond executed by said Powers and one Ashley, to said R. B. Heath.

The defendant pleaded first *non est factum*, and second, that the bond mentioned in the declaration was executed by the defendant to the plaintiff, in part consideration of the sale of a certain tract of land sold by the plaintiff to the defendant; and that by a decree of the Benton circuit court, rendered on the 9th December, 1844, in a certain chancery cause, wherein the said defendant and Ashley were complainants, and the said plaintiff and Charles S. Waters were defendants, said bonds were cancelled, &c.

Plaintiff replied, that at the time and before the commencement of the said suit in chancery, Browder, admr. &c., for whose use this action was brought, was the equitable owner of the said bond, and that the said bond had been transferred by the said Richard B. Heath, to the said Jonas Heath, in the lifetime of the said Jonas, (the intestate of Browder,) by delivery, for value received by the said Richard, of the said Jonas; that the said assignment was made before the commencement of the said chancery suit, and that said Browder was not made a party, nor had he received any notice of said suit.

To this replication there was a demurrer, which being sustained, the plaintiff withdrew his other replications, and judgment was given on the demurrer for the defendant.

The only question is, whether the demurrer was properly sustained.

In *Bates against Martin*, (3 Mo. R. 367,) it was held that payment of a bond or note to the assignor, after assignment, would be no bar to an action by the assignee, whether the assignee had given notice to the maker previous to the payment or not. This construction of our statute concerning assignments, has been subsequently recognized by this court in the case of *Cohen v. Per. Ins. Co.*, 9 Mo. R. Our statute, however, requires the assignment to be in writing, and though that writing may be on a separate piece of paper, as was held in the case of *Isbell & Abel vs. Shields & Hickerson*, (7 Mo. R.,) yet the writing itself must show that it has been made, and therefore an assignment in general terms of all the assignors goods, effects, &c., will not constitute such an assignment of a specific note, as to be within the meaning of the statute, and enable the assignee to maintain an action in his own name. *Miller v. Paulsel & Newman*, 8 Mo. R. In the case now under consideration, the assignment was a mere equitable one, by delivery,

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and though courts of law will protect the interests of such an assignee, it is clear, that we are not under any obligation to apply the principles heretofore, and yet held by this court in relation to assignments in writing. The cases hitherto have been such as the court thought affected by the phraseology of our statute, and the rule which seems to have prevailed very extensively elsewhere, was made to yield to the imperative commands of the statute, which seemed to preclude the obligor from anywise affecting the rights of the assignee after assignment. We are then thrown back upon the equitable principles which govern courts of law, in protecting the assignee of a chose in action, and that principle requires the assignee to give notice of his interest, otherwise a payment to the obligor, or a discharge by him, will defeat it.

The plea in this case is like a plea of payment; and the republication should have averred, that at the time of the commencement of this chancery suit, or at all events prior to its termination, the defendant had notice of the interest of Jonas Heath. *Dawson v. Coles*, 16 John. R. 51; and Cowen & Hill's notes, Ph. Ev. p. 164, 975, and numerous authorities there cited.

The demurrer was therefore properly sustained, and the judgment of the circuit court is affirmed.

COUCH vs. HUGHES.

See LEWIS vs. LEWIS, ante.

ERROR to Platte Circuit Court.

NAPTON, J., delivered the opinion of the court.

The facts of this case are substantially the same with those of the case of *Lewis vs. Lewis*. It was a bill in chancery praying for a decree of title from the person who had entered a quarter section of land, upon which the complainant had a right of pre-emption, but which pre-emption right was not allowed by the register and receiver. The bill was demurred to, and the demurrer was sustained.

The decree of the circuit court is affirmed.

Henry, et al. vs. State, to use of Russell, &c.

HENRY, ET AL. VS. STATE, TO USE OF RUSSELL, &c.

1. Where an administrator had made final settlement, and the county court has made an order to distribute the money in his hands, no demand need be made by the distributees to make the adm'r liable to an action.
2. Where one of the distributees was a minor, but had a guardian, it was the duty of the adm'r to pay the money to the guardian.
3. The adm'r is liable for interest upon the money so improperly held by him.
4. An administrator's bond is valid against him, although not approved by the county court.

ERROR to Polk Circuit Court.

HENDRICKS, for Plaintiff.

To reverse the judgment of the circuit court in this case, the plaintiffs here rely on the following points.

1. There is a material variance between the bond read in evidence, and the bond as described in the declaration. 1st, as to the date of it; 2d, as to the recital that Henry had been appointed administrator; and 3d, it was described in the declaration, as one approved by the county court, and there was no such approval, except the certificate of one of the judges, which was no evidence of that fact.

2. The 4th plea alleges that at the time the administrator made his final settlement, and at the time the said sum of forty-nine dollars was ascertained to be J. C. Russell's distributive share of said estate, and ordered to be paid to him, he said Russell was, and still is an infant, under the age of twenty-one years, and not in a situation to receive the same, and give a discharge therefor, and for that reason said Henry retained it, and did not pay it over to him. The replication averred that on the 9th day of February, 1844, John Jump was appointed his guardian, &c. To this replication there was a demurrer, and it was overruled. We think the plea was a sufficient bar to the action under our statute. See Rev. Code, p. 61, sec. 14. The replication was insufficient, because it did not aver that the administrator had notice of the appointment of Jump as guardian, nor does it aver that Jump made a demand of the money due said James C. Russell, before the suit was brought, nor at any time. It is confidently believed that the administrator cannot be made liable to be sued and mulcted in costs to the amount of said J. C. Russell's distributive

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share of said estate, until it is demanded of him by the guardian, or at least until it is shown that he knew of the appointment of said Jump as guardian. Neither of which facts being alledged in said replication, it is bad, and the circuit court should have sustained the demurrer to it.

3. No demand of the said distributive shares of said estate is averred either in the declaration or replication, and none being proved previous to the commencement of the suit the court ought not to have found against the defendants below.

4. The declaration is insufficient—because it does not allege a demand before suit is brought, and because the breach assigned is not paying to J. C. Russell. The breach is insufficiently set out, as it does not negative the payment of the money to the guardian, as well as ward.

5. The court gave judgment, and assessed damages for sixty-six dollars and forty-four cents, whereas the amount of said J. C. Russell's distributive share of said estate was forty-nine dollars. The circuit court allowed interest on said amount from the time of the final settlement of the administrator in the year 1839, to the time of the trial. We think there is certainly error in allowing interest against the administrator, for money which he had in his hands as administrator, ready to be paid whenever J. C. Russell became to be in a situation to receive and give discharge for it, either in person, or by guardian—no order being made by the county court for him to retain and pay interest—at least he ought not to be chargeable with interest until he be called on for the money. To charge him with interest from the time he made his settlement in 1839, to the time Jump was appointed guardian, is to make him pay interest on the money which is in his hands, liable to be called for at any time, and which he had no means of paying over to any person, the county court never having ordered the administrator to pay the guardian at any time.

For all these reasons we expect the judgment of the circuit court to be reversed.

PHELPS, for Defendants.

The court did not err in overruling the motion in-arrest. Defendants had demurred to plaintiff's replication—a judgment had been rendered on the demurrer. After judgment on demurrer, a motion in arrest cannot be made. Graham's Pr. 519; 2 Tidd 948; 1 Str. 425; 6 Tann. 650.

The judgment on the demurrer to the replication was for the right party, as the plea was faulty. It did not contain any averment that

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the county court had ordered Henry to lend the money of the distributee. Stat. 61, s. 14.

The court did not err in receiving in evidence the bond. The plea of *non est factum*, did not require the plaintiff to prove that the bond had been approved by the county court. The bond was valid. 6 Mo. R. 81.

The declaration contained all the necessary averments for the plaintiff to maintain the action. 4 Mo. R. 426.

The orders of the county court, making distribution, and directing the administrator to pay to the heirs their respective shares, amounted to a judgment. The court did not err in allowing plaintiff interest, at the rate of six per cent. per annum. 7 Mo. R. 469.

NAPTON, J., delivered the opinion of the court.

This was an action of debt brought in the name of the State, for the benefit of James C. Russell, by his guardian John Jump, against the administrator of the estate of Henry A. H. Russell, deceased and his securities.

The breach assigned is, that three years had elapsed since the date of letters of administration, and that upon final settlement with the county court of Polk county, there remained in the hands of the administrator for distribution the sum of \$441 05, which the county court ordered to be paid to the distributees, and that the administrator had failed and refused to pay over to the plaintiff his distributive share.

The declaration is in the usual form, setting forth the bond of William Henry and his securities, and contains the necessary averments in relation to the date of its execution, and approval by the county court.

The defendants pleaded *non est factum*, and, further, that at the time the settlement of said Henry was made with the county court, and ever since, the said plaintiff was not in a condition to receive his share, as adjudged to him by the county court, and give a discharge therefor, he being a minor under the age of twenty-one years, &c. Replication, that on the 9th Feb'y, 1844, the said John Jump was appointed by the county court of Polk county, guardian of the said plaintiff, Russell, and from thence hitherto, and at the time of bringing suit was and still is guardian, and authorized to give a proper discharge, &c.

To this replication there was a demurrer, and the judgment on the demurrer was for the plaintiff.

On the trial, upon the issue of *non est factum*, the plaintiff read the bond of defendants, which was objected to for variance, and the endorsement thereon, which was as follows :

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"State of Missouri, county of Polk—The within bond was this day produced in open court, and was by them approved, this 8th May, 1836.

WINFREY OWENS, J. C. C."

The plaintiff also read from the records of the county court, showing the orders of the county court on final settlement of said estate, to which no objections were made. It was also shown that said Henry's administrator was one of the judges of said court, at the time of said settlement.

The court gave judgment for the amount of the distributive share of plaintiff, and allowed interest from the date of the final settlement, at the rate of six per cent. per annum. A motion for a new trial was made and overruled, and a motion in arrest of judgment; exceptions were taken to the several opinions of the court, and the case is brought here by writ of error.

The alleged variance between the bond offered in evidence, and the bond as described in the declaration, relates to the dates of its execution and approval, and its recitals; but upon an inspection of the record, we have been unable to discover any material variance.

As to the insufficiency of the evidence of approval, it is a matter of which the defendants can claim no advantage. The bond is not the less valid, though it may not have been approved at all.

The demurrer to the replication was properly decided for the plaintiff. The plea was no answer to the action; for if the distributee, though under age, had a guardian, it was the duty of the administrator to pay over the share of such distributee to the guardian. The replication, therefore, if the plea even be considered sufficient, was a complete answer to the plea. No demand was necessary. The order of the county court constituted sufficient notice to the administrator of his duty.

Nor do we think the allowance of six per cent. interest upon the sum due the distributee upon final settlement, at all unreasonable. If the executor or administrator does not desire to retain the money of the estate which he has administered, and of which administration he has made a final settlement, in cases where the distributees are not competent to give discharges, he may, under the directions of the county court, lend out the money upon good security. When he retains the money, it is presumable that he derives from it that benefit which the law supposes the money to be worth, and he is properly chargeable with the interest.

Judgment affirmed.

Mead and others vs. Matson and others

MEAD AND OTHERS VS. MATSON AND OTHERS.

This was a petition and motion to set aside a sale of land made by a sheriff. The motion being overruled, and the bill of exceptions not showing that any evidence was offered before the circuit court, the judgment of that court is presumed to be correct.

ERROR to Livingston Circuit Court.

TODD & ANGNEY, for Plaintiffs.

1. The sale was made under an irregular process, because it did not follow the judgment by setting forth fully the names of the defendants therein; Bingham on Executions, p. 178-186; 6 Term. Rep. p. 525, Tidd P. 998.

An irregular *fi. fa.* is void, and of course all acts done under it; 1 Cow. R. p. 711; 3 Marshall Rep. 618.

2. The sale was void, because the whole tract was sold in a mass, and also because more was unnecessarily sold than sufficient to make the money commanded by the writ; and by such sale much more money in fact was made than commanded by the writ; Revised Code, p. 257, § 26; 7 Mo. Rep. p. 346; Morehead & Mason's Digest of Kentucky Statutes, 1834, p. 625; 2 Bibb. Rep. 401; 3 Marshall Rep. 618; 6 Monroe Rep. p. 27; 2 J. J. Marshall's Rep. p. 36 and p. 68; also 4 Cranch. Rep. 403; 6 J. Ch. Rep. 411; 18 J. R. p. 355; 8 John. Rep. 333; 6 Wendell, 524; 3 Dana, 235; 1 Binney, 61, semi-annual for January Term, 1844, p. 460.

3. This proceeding to set the sale aside was not made too late; 1 Bibb, p. 155; 2 Bibb, 401. There have been no *laches*, nor is the situation of the parties changed; and in case of irregularities the general rule is, that a party is in time to take advantage of it, if he apply at the first opportunity thereafter, which in this case was the April term, at which the plaintiffs in error did apply.

STRINGFELLOW, for Defendants.

It is insisted for defendant in error:

1. That the petition itself is defective in not showing whether a deed had been made to the purchaser, (Matson.) If a deed had been made, it is insisted that upon a mere motion the deed could not be cancelled. The party must resort to equity.

2. That petitioners having offered no evidence to sustain their petition, the circuit court properly overruled their motion.

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3. It is insisted, that there should have been, not only the execution, but evidence to show that the land was susceptible of division, and if divided could have been sold for more than sufficient to satisfy the execution.

4. There being no evidence before the court, either of the amount of the execution, the manner of sale, or the value of the land, the court could not take the petition as evidence of these matters, and hence should have overruled the motion.

5. It is submitted that a motion to set aside a sale under execution, cannot be made after the return term of the execution; at all events, not after deed made and the term passed, as for aught that appears in this petition, was the case in this instance.

NAPTON, J., delivered the opinion of the court.

On the 19th day of April, 1843, Edward Mead, George Mead and others, filed their petition in the circuit court of Livingston county, to set aside a sale made by the sheriff said county.

The petition set forth the following facts: that in August, 1840, Roderrick Matson recovered against the petitioners the sum of seven dollars costs, in a certain cause which had been instituted by petitioners against said Matson, in the said circuit court of Livingston; that on the 16th Sept. 1842, an execution issued on the same; that by virtue of said execution the sheriff of Livingston county, on the 16th Nov. 1842, levied on the N. W. qr. of sec. No. 20, T. 57, R. 24, situate in said county of Livingston; and on the 15th Dec. 1842, said sheriff sold the whole of said quarter section in one entire parcel, without dividing the same, or offering to sell the same in parcels; and that one Charles Matson became the purchaser at the sum of twenty-five dollars, as appears by the execution, levy, return, &c.

The petitioners state that they were the owners of said quarter section of land at the time of this sale: that it was susceptible of division: that a much less quantity than was sold, would have satisfied the execution: that the larger portion of said land was, and now is, in the town of Utica, and had been surveyed and laid off into town lots: that the said land was susceptible of other divisions, to to-wit: into tracts of eighty or forty acres, &c., either of which would have brought the amount required to be made, &c.: that said petitioners, nor either of them, had any notice of said sale: that they have not assented to the sale: that this is the first opportunity they have had of applying to set it aside, and they tender the amount of purchase money, &c.

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This petition was accompanied by a notice to Roderick Matson and Charles Matson, and Jasper N. Bell, that a motion to set aside said sale would be made; and an affidavit of said Mead and others, the petitioners, which stated in substance, that they are citizens of St. Louis, and had no notice of the sale, &c., and did not direct the sheriff to sell the whole tract, and other matters substantially the same contained in the petition.

The motion was overruled, and exceptions were taken, and the cause is brought here by writ error.

The judgment of the circuit court must be affirmed. Whatever merits there may be in the case, it is plain that there is nothing preserved by the record, from which this court can see whether the circuit court erred or not. No evidence whatever is preserved by the bill of exceptions. It does not appear whether the sheriff had executed a deed for this land or not; nor, indeed, can we conjecture upon what grounds the circuit court acted. We must presume that court decided correctly until the contrary appears.

Judgment affirmed.

CALLAHAN, PUBLIC ADM'R. VS. GRISWOLD.

1. The decision of a county court upon a petition to sell land of an estate for the payment of debts, is not to be regarded a *res adjudicata*.
2. The county court may order the public administrator to take possession of an estate, in any case in which no administration has been taken out under the general law.
3. The judgment of a court of competent jurisdiction cannot be impeached in a collateral proceeding by a party to the same; but a stranger may show that the judgment was obtained by fraud or collusion, and is thus void as to him.
4. Upon a petition by an adm'r to have the land of an estate sold for payment of debts, a party interested in the land may resist the application and show that the judgments were obtained by fraud and collusion.

ERROR to Warren Circuit Court.

LEONARD & BAY for Plaintiff.

1. The judgments of the circuit court of Franklin county, allowing the demands of Alexander McKinney against the estate of Robert Mc-

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Kinney, are conclusive in this proceeding. The 8th section of the 4th article of the act of 1835 concerning "Administration," gives to the order of allowance of a demand against an estate, the "force and effect of a judgment;" and this is an attempt to impeach the judgment of a court of competent jurisdiction in a collateral proceeding; *Montgomery vs. Farley & Robinson*, 5 Mo. R. 233; *Hawly vs. Mancius*, 7 J. C. R. 174; *Homer vs. Fish*, 1 Pick. 435.

2. The defendant in error, Griswold, is not only attempting to impeach the judgment of a court of competent jurisdiction in a collateral proceeding, but without making Alexander McKinney, to whom the judgments belonged, a party to this proceeding. Admitting that the judgments could be avoided in a proceeding like this, yet it would be necessary to make Alexander McKinney a party, before his rights could be affected or adjudicated upon.

3. Even if the judgments could be set aside in a collateral proceeding, without giving any notice to the party to whom the judgments belonged, yet there is no evidence of fraud, either on the part of the administrator or Alexander McKinney. Both believed the demands to be just, and the only evidence offered is the assertion of Griswold in his notices, which were clearly illegal and irrelevant.

4. The evidence offered on the part of Griswold should have been excluded from the consideration of the court as impertinent and irrelevant. Griswold does not stand in the light of an heir, but as a mere speculator, as appears from his own evidence.

5. The writings purporting to be evidence of Hughes, the former administrator, and Alexander McKinney, taken in another proceeding, should have been excluded. A party to a proceeding cannot be compelled to testify; *Greenleaf on Ev.* 398.

6. The application for the order of sale of the real estate was made in strict conformity with the provisions of the administration law. See art. 3rd, sects. 8, 9, 10, 12, act of 1835, concerning administration.

7. The county court had full power to order the public administrator to take possession of the estate of Robert McKinney: See act concerning "Public Administrations," statutes of 1835, p. 64, 65, sec. 8. But no appeal lies from an order of the county court directing the public administrator to take possession of an estate, or a refusal to rescind such an order. Besides, Griswold was a stranger, and had no right to object, and indeed has taken no appeal from the order of the county court.

8. The questions now before this court never have been adjudicated between the parties. If the refusal of the county court to order a sale

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of real estate, on the application of the administrator, is to be considered as coming within the rule, *res judicata pro veritatem accipitur*, then the rights of creditors would be entirely lost by a mere informality or illegality of proceeding, in an act purely ministerial on the part of the administrator.

The county court do not adjudicate upon the rights of the parties, but merely refused to grant an order of sale upon grounds not affecting the ultimate rights of the parties. See the case reported in 6 Mo. Rep. 248-9.

CARTY WELLS, for Defendant.

For the defendant I make the following points :

1. The public administrator had no power or authority to act as administrator in this estate, it not coming within the provisions of the statute authorizing him to act. See Revised Laws of 1835, p. 65, sec. 8.

2. If said administrator had power to act, the sale ought to have been ordered for several reasons : 1st. Because this very question had been before fully adjudicated between the parties, and that decision is a bar to this proceeding. See 1st Pirtle, 86-7, and cases cited. For right of him to defend, 6 John. Ch. C. R. 360. 2nd. Because the debts, if any in fact existed, were not such as that land in Missouri should be sold to pay them ; Story's Conf. Laws.

3. There had been an administration in the State of Indiana, where Robert McKinney resided and died. This was the principal administration. There being no personal property in Missouri, no letters could be lawfully granted by the courts of this State. See Revised Code, 2 sec. of Adm'r. law, p. 41.

If however, letters could lawfully be granted in Missouri, the administrator was only auxiliary to those in Indiana, and there being no resident creditors in this State, the fund should first go to the distributees, if resident here ; if not, it should have been sent to the principal administrator for distribution there, according to the laws of that State; under such circumstances, land could not lawfully be sold. See Story's conflict of laws.

4. The demands allowed in Franklin circuit court, were barred by limitation.

5. Their allowance was obtained, and suffered by gross fraud and misconduct, on the part of Alexander McKinney, and the administrator of the estate. To prove this, I rely on the following facts:

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1. McKinney's object was to get the land, and not to collect debts due him from the estate; and with this view he purchased of a part of the heirs, and thereby admitted their title to be valid. Finding that he could not accomplish his purpose in this way, he wrote to his brother in Indiana to buy up those old debts for the purpose of using them, to divest the heirs of their title.

2. These debts were not judgments, or even allowances by the probate court of Indiana. They were merely reported debts.

3. There is no evidence that he ever bought them, or that his brother bought them, either from the true owner, or from any other person.

4. There is not even evidence that the owners were alive, at the time they were set up as debts here.

5. One of them was allowed to Wallace adm'r; yet he sues here for it in Wallace's name, as his individual debt.

6. Even if they had been judgments in the State of Indiana, lawfully allowed against the administrator there, and still remained in full force, still the administrator Hughes, in this State, was not bound by them, he having been no party there, and representing a different portion of the estate of the deceased.

7. Yet the administrator here, at the request of McKinney, (who was not a creditor or a distributee,) obtained letters here for the avowed purpose of aiding and assisting McKinney in having these old claims allowed in this State, in order to sell the land.

8. It is the duty of an administrator to defend all suits brought against the estate which he represents, and especially all illegal demands. Yet in this case, Hughes not only fails to defend, but actually employs an attorney, and directs him "*to see that the claims are fairly allowed,*" and this after he has had notice of the character of the claims.

9. The administrator employs one lawyer, and McKinney another, and McKinney pays both, and they appear before the court, and have judgment entered without observing even the forms of the law.

10. He refuses to appeal, although urged to do so, by one deeply interested.

11. The judgment when allowed, is in its terms, only a judgment to be paid out of the *assets in the hands of the administrator*.

These things clearly establish fraud and collusion between the claimant and the administrator, and the judgment ought not to be enforced.

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NAPTON, J., delivered the opinion of the court.

This was an application to the county court of Warren county, by the public administrator of said county, having in charge the estate of Robert McKinney deceased, for the sale of certain real estate, belonging to the heirs of said McKinney, to satisfy certain claims which had been previously allowed against the estate. Griswold, who had purchased the interest of several of the heirs, appeared in the court, and objected to the sale. Griswold also moved the court to rescind the order directing the public administrator to take charge of this estate, but the motion was overruled. The objections of Griswold to the sale were also overruled, and the land was ordered to be sold. From this decision of the county court, Griswold appealed to the circuit court, where, upon a trial *de novo*, that court refused to make the order, and to this judgment of the circuit court the public administrator brings his writ of error.

It appears from the bill of exceptions, that Robert McKinney died in Indiana in 1823, never having resided in this State, but owning a tract of land in Warren county. The probate court of Washington county, Indiana, granted administration of his estate to Sarah McKinney, and Hugh Kelso. On the 18th Nov'r. 1824, the said administrators filed their bill in the chancery court of said county of Washington, alleging that the estate was insolvent, and praying for the appointment of commissioners to settle said estate, according to the statute laws of that State, regulating the settlement of insolvent estates. On the 7th April, 1827, the said commissioners made their report, in which they set out all the debts of the estate to be \$1856 74, and report the assets as amounting to \$127 62, and declare a dividend accordingly, of two cents and some mills to the dollar. On the 8th Dec. 1828, the report of the commissioners was approved. In the meantime, and prior to the grant of letters in Missouri, eight of the children of said Robert McKinney sold their interests in the land in Warren county to Frederick Griswold, the defendant in error, and two of them sold to Alexander McKinney.

Several of the claims against the estate of Robert McKinney, which were allowed by the commissioners in Indiana, amounting to about sixteen hundred dollars, were purchased by Alexander McKinney, who thereupon procured James Hughes to take out letters of administration in Warren county, in this State. There was no other property of Robert McKinney in Warren county, except the land heretofore mentioned. In 1836, Alexander McKinney presented these claims to the

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county court of Warren county for allowance, but no allowance being made by that court, he appealed to the circuit court for said county, and the judge of that court having been of counsel in the cause, the venue was changed, first to St. Charles, and subsequently to Franklin. At the February term, 1838, of the Franklin circuit court, these claims were allowed, and the administrator was ordered to pay them out of the assets in his hands belonging to said estate. These judgments were afterwards presented to the county court of Warren county, and by that court ordered to be paid in the fifth class. Hughes, the administrator, then filed his petition, praying for an order for the sale of the real estate, for the purpose of satisfying these demands. The county court refused to order the sale, and Hughes appealed to the circuit court, where the judgment of the county court was affirmed. From this judgment, an appeal was taken to the supreme court, and this court affirmed the judgment of the circuit court, it not appearing on the record how the Franklin circuit court had gotten jurisdiction over the claims. See Hughes, admr. of McKinney v. Griswold, 6 Mo. R. 245.

On the 17th Nov., 1841, Hughes resigned his letters of administration, and the county court ordered Berton Callahan, public administrator, to take charge of said estate of Robert McKinney, deceased. On the 22d Feb'y, 1842, Callahan filed his petition in the county court of Warren county, to sell the real estate of said McKinney, when the proceedings took place as heretofore stated, resulting in a judgment, to which this writ of error has been sued out.

The objections of Griswold to the application of the administrator, were numerous, but seem to be chiefly based upon two points; first, the former adjudication in the case of Hughes, admr. v. Griswold; and second, fraud and collusion in obtaining the Franklin judgments. In support of his objections, he offered in evidence:

1. Deeds from eight of the heirs of Robert McKinney to himself, conveying all their interest in the land, and title bonds from the two remaining heirs to Alexander McKinney, all of which were executed prior to the grant of administration to Hughes in 1834.

2. A notice to Hughes, adm'r &c., dated Feb'y 1836, to defend the claims brought by A. McKinney, against said estate, and directing said Hughes to employ counsel, take appeals, &c.

3. Another notice, dated March 3, 1838, advising said Hughes of his interest in the land, and that the several allowances made by the Franklin circuit court, were illegal, setting out at large various objections to said allowances, and urging said Hughes to take bills of exceptions to the opinions of said court, and appeals and writs of error, if necessary,

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and binding himself to pay all costs and charges attending such defence.

4. The testimony of said Hughes, former adm'r, &c., of Alexander McKinney, which is substantially as follows :

Hughes states that he took out letters of administration at the request of Alexander McKinney, in order that McKinney might get his claims allowed, and have the land of Robert McKinney sold for the payment thereof; that he never employed counsel to defend against these claims, until the court in Franklin, and never at any time directed any defence to be made; that he believed them to be just, having known several of them himself, for upwards of twenty years; that he wrote to an attorney to attend to the suits in Franklin, and see that the claims were fairly allowed; that he sent his letter to said attorney by Alexander McKinney; that he did not attend himself, nor take any appeal from the decision of the Franklin circuit court.

Alexander McKinney testified, that he was present at the Franklin circuit court, when these claims were allowed; that the only evidence offered in support of them was a copy of the records of the probate court of Washington county, Indiana, that the administrator had counsel there; that he had bore a letter from the administrator to said attorney; that he had paid said attorney his fee; that said attorney did not plead the statute of limitations, nor in any manner oppose the allowance of the claims; that said attorney told the court he thought the claims just and legal, and that they ought to be allowed. This witness further stated, that he knew the heirs of Robert McKinney, deceased; that he bought of one of said heirs her interest in the land in Warren, before she was of age, and that after she became of age, she had conveyed to Griswold; that said Griswold got another deed by fraud, which he could prove; that there was an agreement between him and Griswold to buy out all the interests of the heirs, and at that time witness knew of no debts against the estate, and supposed Griswold knew of none; that Griswold acted *underhandedly* with him, and he refused to have anything more to do with him; that he then wrote to his brother-in-law in Indiana, to learn the condition of R. McKinney's estate, and hearing that there were debts against it, he got his brother-in-law to buy them for him; and that he afterwards procured Hughes to administer, in order that he might get them allowed, and have the land sold, as it was his intention, if possible, to get the land.

This testimony was objected to as incompetent and irrelevant, but it was admitted, and exceptions were taken to its admission.

1. It is contended by the defendant in error, that the judgment in the

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case of Hughes, adm'r vs. Griswold, which was affirmed by the Supreme Court in 1840, is a bar to any further proceedings on the subject matter therein adjudicated. We do not regard the refusal of the county court of Warren, as a judgment of this character. It may be questioned whether the principle of *res adjudicata*, applies to those decisions which are made by courts, acting in a summary way upon an application addressed to their discretionary jurisdiction. In such cases if the facts upon which relief is claimed, be the same upon a second application that they were in the first, by analogy to proceedings in the ordinary course of judicial investigation, parties will generally be held precluded by the result of the first application. Scherman vs. Weatherhead, 1 East. 537; Greatheat vs. Bromley, 7 Durn. & East. 451. But it seems that where it subserves the purposes of justice, courts will hear the second application and decide it differently, without being bound by the former adjudication. Sampson vs. Hart, 13 John. R. 63. In the case now under consideration, the record does not show what facts were before the court when the application was first rejected by the county court of Warren. It seems that the cause when up in this court turned entirely upon the absence of record proof to show the jurisdiction of the circuit court of Franklin county over demands against the estate of R. McKinney, and that the case was not at all decided on its merits. The decision of the county court may have been based upon the same, or similar grounds, and therefore would be no bar, even though the evidence was in other respects substantially the same on the second application, as it had been upon the first.

2. The right of the county court of Warren to order the public administrator to take charge of the land of R. McKinney, deceased, has been questioned. The objections to this power, are founded upon the phraseology of the eighth section of the act concerning public administrators. This section does not in terms embrace a case like the present; but we understand the general scope of that statute to comprehend every case in which letters have not been taken out under the general law of administration. At all events, no inconvenience is likely to arise from such a construction, as the creditor himself could, under the general law, have administered, and his impartiality or responsibility is not so well secured as that of the public administrator, who is an officer appointed by law, and has to give bond and security for the faithful discharge of his duties. We pass this objection to consider the main point in the case, which is:

3. That the Franklin judgments were obtained by collusion and fraud, and were, therefore, properly disregarded.

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Previous to examining this point, a question has been raised relative to the competency and relevancy of the testimony of Hughes and A. McKinney, which it is proper to dispose of. The record is exceedingly confused and imperfect, adopting as it appears by consent the bill of exceptions taken in the county court, as a bill of exceptions to the opinions of the circuit judge. It does not appear how the testimony of Hughes and McKinney was taken, whether by deposition or orally; but we presume it was voluntarily given. McKinney being substantially a party, could not have been compelled to testify, but his testimony having been taken, and that of Hughes also, and no objections being made to it except on the grounds of incompetency or irrelevancy, we are of opinion it is competent *against them*, and very relevant to the matter in dispute.

The judgment of a court of competent jurisdiction cannot be impeached collaterally, in another court, in an action between the same parties, and upon a point once put in issue and decided. The party must apply to the court which pronounced the judgment to have it vacated. This principle does not prevent a party who was a stranger to the proceeding, and had no opportunity of defending against such judgment, from showing that it was procured by fraud, and that an unconscientious use is about to be made of it. In a suit against an administrator, if he plead judgments outstanding, the plaintiff may reply that the judgments were obtained by fraud. 2 Ch. Pl. 637; 1 Ph. Ev. 346. Griswold was no party to the proceeding in Franklin county; he had no right to interfere until an application was made to the county court of Warren to order the sale of the land. In that proceeding it was the duty of the administrator to notify the heirs, and they are expressly authorized and invited to come in and show cause, if any they have, why the land should not be sold pursuant to the petition. Representing the interests of the heirs, Griswold had a right to appear and protect his interests; and to effect this, he could show that the Franklin judgments, for which the land was proposed to be sold, were fraudulent and void.

The question then remains, was there any evidence to warrant the circuit court of Warren county, upon the trial of the case appealed from the county court, in pronouncing these judgments fraudulent and void. A bare statement of the facts is, we think, sufficient to show that the court did not come to a wrong conclusion.

McKinney, who is disappointed in getting the title to this land in Warren county from the heirs of R. McKinney, and who believes himself to have been defrauded by Griswold in the matter, considers Gris-

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would's *underhanded* proceedings as a justification of his efforts to procure the title in another mode. It is not material in this case, whether this justification be a good one, legally or morally. Through the instrumentality of a friend in Indiana, he purchases certain claims which had been proved before commissioners appointed to settle the insolvent estate of R. McKinney, in the year 1827, and to have them enforced here, he gets Hughes to administer in Warren county. The claims are presented to the county court of Warren county, and rejected; upon appeal from that court to the circuit court, the cases are transferred to the circuit court of Franklin county, where they are ultimately disposed of. The administrator, instead of making a *bona fide* defence, knowing, as he states himself, that they were claims of *twenty years* standing, employs an attorney to "*see that they are fairly allowed;*" and Alexander McKinney, who is prosecuting these claims, pays this attorney his fee. The attorney seems in fact to have regarded himself as the attorney of McKinney, and not of the administrator, for we find him assuring the court that the claims are just, and ought to be allowed. The only evidence presented to the court was these Indiana records, which were no evidence whatever against the administrator here; but the court gives judgment against the administrator, at the suggestion of the administrator's counsel. No bills of exceptions are taken, and no appeal or writ of error. No plea of the statute of limitations was pleaded. This state of facts shows, as we apprehend, a complete perversion of the legitimate purposes of judicial proceedings, to attain an object entirely foreign to the apparent purposes of the actors. To uphold such proceedings, would be a reproach upon the administration of justice, and a fraud upon the law, which provides for the settlement of estates.

We look upon the judgments in the Franklin circuit court, as in fact, judgments by confession, and collusion, between the administrator and the plaintiff, McKinney. As such they were properly disregarded.

Judgment affirmed.

STATE TO THE USE OF McMAHAN & HUSTON VS. HAMILTON AND OTHERS.

1. A sheriff to whom a *capias* was issued, returned, "This execution is returned not satisfied, there being no property of D. found in B. county whereon to levy, and make the same; and the said D. having taken the benefit of the bankrupt law." In an action of debt upon his bond for not arresting the defendant,

State, to use of McMahan & Huston, vs. Hamilton and others.

Held:

1. That a sheriff is not liable to an action of trespass for arresting a person discharged under the bankrupt law.
2. The sheriff may refuse to arrest him; but if he do, it will devolve upon him to shew that the defendant was exempt from arrest.
3. The return of the sheriff is no evidence of that fact in his behalf.

ERROR to Boone Circuit Court.

TODD, for Plaintiff.

The plaintiff contends to reverse the judgment,

1st. That the bond, judgment, execution and default of the sheriff, are fully proven.

2nd. The return on the execution shows a failure to take the body; it was his duty to seize the body; the excuse offered is no legal justification; the sheriff had no right to judge of the sufficiency of the defendant's discharge under the bankrupt law; it was a legal writ, from a competent court, and the sheriff was justified in arresting. 6 Bacon, 165, 166, 168; 18 J. R. 52; 1 Wend. 32. And if he returns matter in excuse of his duty, he should prove it. 6 Litt. 271; 5 Man. 126.

KIRTLEY, for Defendant.

The errors assigned, are,

1st. The misdirection of the judge to the jury, that the plaintiff had not, by the testimony, made out his cause of action, &c.

2. That the court below erred in not granting a new trial.

The single proposition presented for the consideration of the court by the record in this case, is the propriety of the instruction given by the court to the jury, on the motion of the defendants.

We insist that, that instruction was rightfully given, and rely on the following authorities to sustain it: 3 Littell's Reports, 44, Faris v. Fuqua; 1 Starkie, 330, 2 vol., 2 part. 1033; 3 Phil. Ev. Cowen & Hill's notes, 1083, 1085; Littell's select cases, 138, Cosby v. Bustard.

NAPTON, J. delivered the opinion of the court.

This was a suit upon the bond of Hamilton, sheriff of Boone county,

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instituted in favor of McMahan and Huston for not arresting the body of one Jesse B. Dale, against whom they had an execution. The breach assigned is, "that said Hamilton did not for want of sufficient goods and chattels, lands and tenements of Dale, whereon to levy and make the debt and costs in the writ, take the body of Dale, although Dale was in the county of Boone, and then and there to be found." The defendants pleaded *non est factum*, and *nil debet*, and also gave notice of special matter of defence. The plaintiff gave in evidence the record of the proceedings in the case of McMahan and Huston against Dale, and of the judgment and execution in that case. The return of the sheriff was as follows: "This execution is returned not satisfied, there being no property of Jesse B. Dale found in Boone county whereon to levy and make the same, and the said Dale having taken the benefit of the bankrupt law. Signed, Aug. 15th, 1842. F. A. Hamilton, sheriff." &c. The plaintiff also offered oral testimony, the object of which was to show that Dale lived in Boone county, and could have been taken under the writ. Upon this evidence the circuit court decided that the plaintiff could not recover, and he therefore submitted to a non-suit, and moved to set it aside. The motion was overruled, and the cause brought to this court by writ of error.

The only question is whether the return of the sheriff is a legal one, and therefore *prima facie* evidence of the facts therein stated.

That an action of trespass could not be maintained in England against a sheriff, for arresting the body of a certificated bankrupt, has been repeatedly adjudged. 2 Black. R. 1190; Douglass, 649. In the last cited case, (Tarlton v. Fisher,) all the judges declared this to be the law, and though the statute under which the plaintiff in that case claimed his exemption, had expressly provided that he should not be liable to arrest by any civil process, yet it was held that the sheriff was bound to obey the mandate of the writ. Lord Mansfield intimated, that if the sheriff chose to take upon himself the truth of the facts, and not arrest the party, he might; and the surrender and compliance with the act would be a good return; but the sheriff would be answerable. Butler & Ashurst express a very decided opinion that the sheriff could not take upon himself to decide upon the discharge, but must execute the writ.

The same doctrine was held by the supreme court of Massachusetts, in the case of Wilmarth v. Burt, (7 Metcalf, 259,) where the effect of a discharge under the insolvent laws of that State was considered. The court declare, that it would paralyze the action of an officer, and often defeat the service of legal process, if he were bound to stop, and try

Turner vs. Belden, adm'r.

the genuineness and validity of a certificate of discharge under a bankrupt or insolvent law. The certificate may not be legal or genuine, and yet the officer can take no evidence, nor even put the debtor himself under oath to prove it.

The same principle is asserted by the supreme court of New York in the case of *Orange Co. Bank v. Dubois*, (21 Wend. 353.) The court in this case admit the right of the sheriff to take notice of the *privilege of the person*, but under the peril of showing that the exemption is well founded. But the court doubt the applicability of this doctrine to process against property, where the defendant has been discharged from the judgment under the insolvent laws.

Under the bankrupt law of the United States of 1841, the certificate is not an absolute discharge; it is not a discharge from fiduciary debts; yet the certificate issued under it is a general one, and if the sheriff takes notice of it, he decides at his peril, how far it is an effective discharge from the execution he is directed to levy.

The return in this case is exceedingly vague and indefinite. It does not return any arrest, or attempt to arrest, nor does it show that Dale claimed any exemption by virtue of the bankrupt law. It simply certifies that Dale had taken the benefit of the bankrupt law. If so, the sheriff must prove that fact, and his return is no evidence to establish it.

Judgment reversed and cause remanded.

TURNER vs. BELDEN, Ad'r.

The declarations of a person in possession of property are not admissible as evidence in his favor, or in favor of those claiming under him to shew title in him.

APPEAL from Howard Circuit Court.

CLARK, for Appellant.

It is insisted by the appellant that the circuit court committed error, for the following reasons:

1. The rights of the plaintiff's intestate to the slaves, depended on the fact whether the defendant had given them to his daughter. The evidence of a gift was not by any means certain; indeed there was no evidence of an absolute gift, but that the slaves were placed in the

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possession of Pulliam upon trial, with an expressed intention to give them, if they suited—the possession being delivered to Pulliam with this understanding—the gift was not completed, and was not intended to be until the slaves had been tried, and the defendant informed that they suited. It was only a promise to give on condition, which condition was never complied with. The third instruction, therefore, was too broad, and is in contravention of a well settled principle of law; 2 Iredell, N. C. Rep. 361; Adams vs. Hays, 2 Alabama Rep. 118; Sims vs. Sims, 2 J. R. 52; Noble vs. Smith.

2. That the possession of Pulliam in this case, under the circumstances, was the possession of Turner; the slaves having been placed in his possession by Turner for a particular purpose, he held them as bailee for Turner, the right to him not having passed by the special possession, and could not pass according to the evidence, until Pulliam notified Turner that the negroes would suit. See 8 Mo. R. 346, Allison vs. Bowles; Harden 531, Woods vs. Chism; 1 Dana Ky. R. 110, Pool vs. Atkinson.

3. That the question of title in this case depending on possession, and the manner in which it was acquired, it was not competent for the plaintiff to use in evidence Pulliam's declaration claiming the property as his. Such a rule would enable any person having property in his possession for a special purpose, to gain the absolute title by a mere claim of right, although such claim was in contravention of the principles of true honesty and fairness. By such a rule, a fathers' intended bounty could be controlled by a mere claim before the gift had actually been made; this being the case, the court ought to have given the fifth and sixth instructions asked for by the defendant. See 1 J. R. Warring vs. Warring, 340; 8 Wend., Welland Canal vs. Hatheway, 480; 4 Cowen, Jackson vs. Cole, 587; 2 Rowle, 241, 2 J. J. Marshall, Talbot vs. Talbot, 4; 4 Bibb, Canole vs. Early, 270; Cowen's notes on Ph. Ev., page 154, note 165, Greenleaf's Ev. pages 120, 176, 203, 223; 5 Mo. R., Wilson vs. Woodruff; 8 Mo. Rep., McLean vs. Rutherford.

4. That this being a suit between Pulliam's representative and Turner, none of the reasons usually invoked in favor of purchasers and creditors can apply. It is a pure question of right, depending on the facts necessary to constitute a gift, there being no pretence of a purchase or other conveyance. It is contended that the facts proved do not constitute a gift, and the instructions given by the circuit court on that branch of the case were erroneous; 8 Mo. Rep., Allison vs. Bowles, 346, and authorities there cited.

5. That admitting the correctness of the general principle, that the

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declarations of one while in possession of property may be used as evidence in his favor, yet such a rule is never applied as between the parties, unless to explain the nature of possession; certainly never to give title. But in this case the court allowed the declaration of Pulliam to go in evidence, not only while he had possession, but before he obtained it; and also as to how he got it, and that too when the question to try, was his title to the property claimed. Upon the principle decided by the circuit court in this case, a person who had the possession of property on loan, or for any special purpose, might acquire the absolute right by holding over, and when he was sued just prove that he had claimed the property as his while he had it, and that claim made, perhaps, in fraud of the true owner, will secure him the property. See authorities cited on the 2nd and 3rd points.

6. It is very clear that the verdict in this case is against the evidence; there is not a particle of evidence that Pulliam ever claimed the children of Ellen, or that they were ever in the possession of Turner. A new trial ought then to have been granted, admitting that the court committed no error in ruling the law on the trial.

LEONARD & DAVIS, for Appellee.

The defendant objects to the declarations of Pulliam given in evidence by plaintiff, made by Pulliam while in possession of the slaves, that they were his own property. In this we think the circuit court decided the law correctly. These declarations are part of the *res gestæ*. See *Williams vs. Vanmeter*, 8 Mo. Rep. 342; *Greenleaf*, 120. See 2 Ph. on Ev. p. 585, 596, 7, 8, and 601, 2.

It is also objected, that the court below permitted the plaintiff to prove that Turner, at the time of the marriage of his daughter, and ever since, was wealthy. We think that where a man's daughter marries, and he sends slaves along with her, his circumstances being such that he could well spare them, that the law will construe his act as an intent to give, in the absence of any declarations touching the subject. See 5 Monroe, 503; 3 Hen. & Mun. 132, *Moore's, adm'r vs. Dawney et al.*; *Greer vs. Mullekin*, 5 Mo. R. 489.

Turner's counsel also contends that the letter written by the intestate (Pulliam) to the witness Pearson, and read in evidence to the jury, was improperly permitted by the court. The letter was produced by the witness, Claiborn F. Jackson, and offered as rebutting evidence to the testimony of defendant's witness, Warson, who had testified that

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Turner wrote the memorandum sent by him with one Short, who went after the negroes to the house of Pearson; witnesses Pearson and Jackson having proved this letter to be the same spoken of by Warson before it was read to the jury. (See instructions of Turner withdrawing the effect of the letter from the jury.)

It is also insisted that the fifth and sixth instructions asked by Turner on the trial below, were improperly refused. That depends upon the admissibility of Pulliam's declarations, as to his ownership of the slaves while in his possession, and treated by him as his own property. See also 4 McCord, 262, and Pool vs. Bridges, 4 Pickering, 378, and cases referred to as above; 2 J. J. Marshall, 383.

Also, the giving of the 3, 4, 5 and 6 instructions asked by the plaintiff below, is assigned for error. It is believed these instructions were correctly given.

When Turner left Pearson's, he instructed him to deliver the negroes to Pulliam or his order, in the event he got them back from Fizer. The order, therefore, sent by Short was in pursuance of the original authority given by Turner.

The record shows that the negroes were continuously in the possession of Pulliam, up to the time of his death, from the time they came from Pearson's.

NAPTON, J., delivered the opinion of the court.

This was an action of trover brought by the adm'r of E. R. Pulliam, to recover the possession of a negro woman named Ellen, and her two children. The plaintiff had a verdict and judgment.

The facts of the case, so far as they are deemed material, were as follows: In 1841 Pulliam married the daughter of Turner, and shortly after the marriage went to housekeeping. Upon this occasion, Turner sent with his daughter a servant girl, named Sarah who remained in the possession of said Pulliam until the winter of 1841-2; when the girl was returned to Turner on account of her not suiting his daughter Mrs. Pulliam. In January, 1842, Turner applied to one Pearson, of Saline county, for the purchase of the slave Ellen, and informed Pearson that it was his wish to purchase a servant for his daughter, Mrs. Pulliam, and if the girl Ellen would suit, it was his design to give her to his said daughter. After some negotiation on the subject, Pulliam and Turner having both seen the girl, the purchase was concluded; the slave and her children were sent to Pulliam, and the purchase money paid by Turner. Pulliam continued in possession of the slave until his

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death, which took place in November, 1842. Evidence was given on the part of Turner to show that the gift to his daughter was not absolute, but upon the condition that if the slave pleased her, it was to be her's; if not, that the slave should be returned.

The plaintiff gave evidence conducing to show the contrary; and amongst other evidence, the declarations of Pulliam whilst he had possession of the girl, of his absolute title, were given in evidence. To the admission of this testimony exceptions were taken.

The court, at the instance of plaintiff, instructed the jury as follows:

1. "If the jury believe from the evidence that the defendant gave the slaves in controversy, or any of them, to his daughter, who was then the wife of the intestate, Pulliam, and that the slaves so given were in the husband's possession during the marriage, they belonged to the husband and on his death vested in the administrator.

2. "In order to constitute a valid gift of a slave, it is not necessary that there should be a deed or any writing manifesting the gift.

3. "In order to constitute a gift it is sufficient that the father placed the slaves in the possession of his daughter, with intent that they should be her property; and if they were originally placed by the father in the daughter's possession on trial to see whether they would suit, and he afterwards permitted them to remain with her, with intent that they should be her property, it was a valid gift to her.

4. "If the jury find for the plaintiff, they ought to find the value of the slaves belonging to plaintiff, converted by defendant to his use, and they may give interest on that value from the time of the conversion to the time of finding their verdict.

5. "If the jury believe that Turner bought the slave Ellen and her children for his daughter, and caused them to be delivered to her, with intent that they should belong to her, that this is a valid gift, although Turner paid for them with his own money, and took the bill of sale in his own name.

6. "That if they find from the evidence that Elijah R. Pulliam had the slaves in controversy in his possession at the time of his death, that such possession is presumptive evidence that he owned said slaves, and the jury are bound so to find, unless the contrary is made out in proof."

The court also gave the following instructions at defendant's instance:—

1. That if the jury believe from the evidence that the defendant Tarlton Turner, purchased the negro woman Ellen and her children, and

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paid for the same, they will find for him, unless they believe he sold or gave the same to Pulliam, subsequent to the purchase.

2. That the circumstance of the negroes being in Pulliam's possession, connected with his claim of right, is not by any means conclusive evidence of title in Pulliam, but such possession may be explained.

3. That in this instance, Turner had a right to place in the hands of Pulliam, his son-in-law, the negroes in question, and to permit them to remain there for any length of time under five years, and that by so doing, he, Turner, did not lose his right to the same, unless they believe he conveyed or gave the same to Pulliam.

4. That although the jury may believe that Turner, when he purchased the woman Ellen, intended to give her to his daughter, or Pulliam, and that he put her in the possession of Pulliam, yet they will find for Turner, unless they believe he had actually given or sold her to Pulliam, or Pulliam's wife.

5. That the request of Pulliam to Pearson to make the bill of sale to him, is no evidence that Turner had given the negroes to him, unless the jury believe Turner knew the contents of said letter.

6. That there is no evidence that he, Turner, did know the contents of said letter.

7. That in this case the plaintiff is the representative of Pulliam, and that it requires the same evidence to entitle him to recover, that it would to entitle Pulliam, if alive and here prosecuting the suit in his own name.

8. That although the possession of Pulliam of the negroes is presumptive evidence of title, yet that presumption may be rebutted by the facts, and circumstances, under which he got and kept possession, with the other facts and circumstances.

9. That whether the defendant did give the said negroes to Pulliam, is a matter of fact for the jury to consider from all the facts and circumstances given in evidence.

The following instructions were asked and refused :

1. That the jury are to disregard all declarations of Pulliam, made while in possession of the negroes, offered in evidence by the plaintiff, which make in favor of the plaintiff's claim to the negroes.

2. That the declarations of Pulliam, as to who the negroes were bought for, are no evidence, unless made in presence of Turner.

The objections to the judgment of the circuit court, are principally based upon two points, the instructions, and the admission of Pulliam's declarations in evidence.

1. We consider the declarations of Pulliam, made subsequently to

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the transfer of the negroes, setting up his absolute title as inadmissible. Declarations of a deceased person, made whilst in possession of land or personal property, in disparagement of his title, have been admitted as legitimate evidence, upon the principle that they constitute a part of the *res gestæ*, and illustrate the character of the possession. Possession is *prima facie* evidence of ownership, and what is said by the possessor to cut down his own title is evidence. Judge Cowen, in his notes to Phillips, (Phillips Ev. 2, 569,) seems to entertain the opinion that the rule is the same where the declarations sustain, or enlarge the apparent interest of the declarant. He lays down the proposition broadly, "that possession of real estate for a long time, may be qualified, and explained by the declarations of the possessor, the apparent owner in fee being thus cut down to the mere *squatter*, and the apparent *squatter* elevated to the owner in fee." In the same way, he adds, the apparent general owner of personal property, may be turned into a bailee or trespasser, and *e converso*. The first branch of his proposition is well settled law, and in support of it, the learned annotator cites a variety of cases; but upon a careful examination of all the cases as stated by him, I do not observe any one which supports the position, that the squatter or trespasser can by his own declarations elevate his title into a fee simple, or that the bailee or trespasser, of personal chattels, can by his own declarations convert his bailment into an absolute interest.

Phillips lays down the doctrine as it was decided in the case of *Human vs. Pettit*, (5 Barn. & Ald. 223,) but carries the principle no farther. "The declaration of a deceased occupier of land, that he rented it under a certain person, is evidence of that person's seizen; it is evidence against a party claiming under the deceased, as his heir at law, to explain the nature of the occupation, and to show that it was not adverse."

Professor Greenleaf seems to coincide with Judge Cowen. "In regard to the declarations of persons in possession of land," says Mr. Greenleaf, in his treatise on evidence, "explanatory of the character of their possession, there has been some difference of opinion, but it is now well settled, that declarations *in disparagement of the title* of the declarant, are admissible as original evidence. Possession is *prima facie* evidence of seizen in fee simple; and the declaration of the possessor that he is tenant to another, it is said, makes most strongly against his own interest, and therefore is admissible. But no reason is perceived why every declaration, accompanying the act of possession, whether in disparagement of the declarant's title or otherwise, if made in good faith, should not be received as part of the *res gestæ*; leaving

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its effect to be governed by other rules of evidence." The cases cited by the author to support the suggestion here made, at least such of them as are accessible, are cases in which the declarations admitted, were uniformly against the interest of the person making them, or at least derogating from the title which his possession alone would have implied.

This question was noticed by this court in the case of *Foster & Foster vs. Wallace*, 2 M. R. 231; *Foster & Foster vs. Nowlin*, 4 ib. 24; and *Wilson, adm'r. of Owens vs. Woodruff*, 5 ib. 40. In the first case, it was held that the declarations of a person in possession of slaves, asserting the title of the declarant, were clearly inadmissible. In the case of *Foster vs. Nowlin*, evidence of this character was admitted, and the court seemed to place its admissibility principally upon the ground that it was in that case legitimate proof to rebut the evidence of previous declarations made by the same party in disparagement of his title. In the case of *Wilson, adm'r. vs. Woodruff*, the court take this view of the opinion in *Nowlin vs. Foster*, and concede that the testimony could only be supported as rebutting evidence.

But we apprehend that the decision in *Foster vs. Nowlin* cannot be sustained; for it does not follow that because a man's declarations against his interest may, under particular circumstances, be given in evidence, his subsequent declarations to support that interest will rebut or diminish the weight of his prior declarations.

2. To the instructions given by the circuit court, we see no objection, except such of them as apply to Pulliam's declarations in support of his title.

As the case will be remanded for a new trial, because of the admission of improper evidence, we refrain from any opinion as to weight of evidence.

Judgment reversed and cause remanded.

T. & J. O'HANLON vs. PERRY.

The pre-emption law of July 9, 1832, was not continued in force by that of 1838. And a pre-emption certificate issued in 1839, and which purported to be under the act of July 9, 1832, is void upon its face.

ERROR to Washington Circuit Court.

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ANDERSON, for Plaintiffs.

On behalf of the appellants it will be contended,

1st. That the instructions given by the court below at the instance of the plaintiff were wrong; tending to mislead the jury.

2d. That the instructions refused the defendants below should have been allowed.

3d. That the circuit court erred, in refusing to admit the evidence offered by the defendants, showing that the lands entered by John Perry on the 26th November, 1839, under the pre-emption act of congress of the 9th July, 1832, had never been offered for sale, and that said land was reserved by surveyor Ashley, 2 Dec'r. 1820, for certain purposes.

4th. That said court erred in refusing the defendants permission to prove that they resided upon, and cultivated said land, and claimed a right of pre-emption to the same, if they could be regarded as public lands liable to entry.

5th. That a new trial should have been granted for the reasons filed.

SCOTT & ZEIGLER, for Defendant.

1. That the certificate of the receiver, and the testimony given by Perry, was sufficient to authorize the finding and recovery. Revised Code of 1835, page 234, sec. 2.

2. That it was not competent for the defendants below, the O'Hanlons, to go behind, or impeach the title of Perry derived from the United States, on the ground of fraud, illegality or irregularity of the acts of the United States officers. 6 Mo. Rep. 106, Hunter vs. Hemp-hill.

3. That it was not competent for the O'Hanlons to show as matter of defence, on a trial in an action of ejectment, that they were entitled to the right of pre-emption, because our State courts have no power to decide that question, as it would amount to an interference in the primary disposition of the soil, against the compact of the State with the United States. State Constitution, Revised Code of 1835, page 25, article 9, section 1.

4. That the O'Hanlons entirely failed to prove the custom on which they pretended to rely, as matter of defence: but if proved, it was no defence in this action of ejectment: but if admissible as a defence and proved, the jury have passed on, and by their verdict negatived that part of their defence. Customs, how proved, 1 Bla. Com. 76-7; 2 Ib. 31.

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5. That the instructions given by the court for Perry, were rightfully given. 6 Mo. Rep. 106, Hunter vs. Hemphill.

6. That the instructions refused to be given by the court for the O'Hanlons, were rightfully refused, and the testimony offered and rejected, rightfully rejected. 1 Mo. Rep. 97, Coleman v. Roberts; 1 do. do. 505, Donahoe v. Glasgow; 1 do. do. 318, Bellissine v. McCoy; 1 do. do. 662, Russell v. Barcroft; 3 do. do. 382, Hines v. McKiney; 3 do. do. 411, Williams v. Harrison; 6 do. do. 6, Nicholas v. State; 6 do. do. 279, Newman v. Lawless.

NAPTON, J., delivered the opinion of the court.

This was an action of ejectment brought by Perry against the O'Hanlons, to recover a tract of land in Washington. The plaintiff had a verdict and judgment in the circuit court.

The evidence offered on the trial by Perry to sustain his action, consisted of the receipt of the receiver at Jackson, for the land in controversy, (about 563 acres,) issued under and by virtue of the pre-emption act of the 9th July, 1832, and proof that defendants were in possession of a part of the premises.

The defendants offered proof conducing to show, that the tract of land in controversy was part of a tract known in former times as the *Citadel tract*, and made by an off-set in the survey of a larger tract, called the *Austin tract*; that John Perry had claimed this land since 1808; had furnaces erected thereon, and cultivated a field, in the tract, but that the community at large, notwithstanding this claim, continued to dig for mineral on the land; that prior to 1803, portions of the land were staked out into lots, without any enclosures or buildings thereon; that defendants had lived on the land for twelve years; that John Perry and the United States agents first set up exclusive title in 1827.

The defendants further offered to prove, that Perry claimed from one Basil Valle, by a conveyance executed in 1806; that said conveyance includes his house and lot in Mine a Breton, and that under this conveyance, Perry had procured a confirmation of his aforesaid lot, and an out-lot, containing about ten acres. This was offered to be proved by the certificate of the auditor of public accounts, sent to the clerk of Washington county.

The defendant offered further to prove, that Perry was not a house-keeper on the land, so entered at the land office at Jackson.

They offered also to prove, that Perry could not have any donation or settlement right under said Basil Valle, because said Valle had a

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concession from the Spanish government, which had been confirmed, and for that purpose read the extract from the books of the recorder of land titles, containing the proceedings of the last board on the *Old Mine concession*.

The defendants further offered to prove that they had filed with the register and receiver at Jackson, a notice of their right, before the land was offered for sale; that they offered to prove up their pre-emption, and tendered payment for the land, but that the same was refused; and they offered *then* to prove that they were entitled to a pre-emption. This evidence was rejected.

They also offered to prove that Perry's entry was illegal; that they had appealed to the commissioner of the general land office, and that the matter was pending, and undetermined in that office.

The circuit court instructed the jury, that the certificate given in evidence was *prima facie* evidence of title; that the regularity of the acts of the officers who sold the land, was not a matter of enquiry in this action, and that the plaintiff must recover, unless the defendants had a better title themselves, or proved a better outstanding title in another.

The defendants asked the court to declare the law to be, that the act of congress of March 2, 1833, does not continue in force the operation of the act of July 9th, 1832, so far as the pre-emptions under the last named act are concerned, any longer than the act of 1832 *per se* does; and that the pre-emption act of 1838, does not revive the act of July 9, 1832, or its provisions in relation to special pre-emptions.

These instructions were refused.

This case is presented in a shape which does not admit of a decision on the absolute merits of Perry's title. The court having excluded all evidence attacking or impugning the plaintiff's title, he was of course not called upon to sustain it, and a reversal of the judgment does not therefore necessarily imply the nullity of the plaintiff's title.

From the testimony which the defendant offered to introduce, and from that which he did introduce, it may be inferred that he desired and intended to prove,

First, That Perry was not a housekeeper on the land entered, and therefore not within the pre-emption clause of the act of Congress of 9th July, 1832.

Second, That the defendants were entitled to a pre-emption.

Third, That John Perry had no claim, the rejection of which would bring him within the proviso of the third section of the act of 1832; and,

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Fourth, That the act of 1832 had expired, when Perry obtained his pre-emption under it, and that the act of 1838 did not revive it.

The first two propositions may be considered together; and I regard them as involving the same questions, which the court determined in the case of *Lewis vs. Lewis*. If a court of chancery cannot try disputed rights to pre-emptions, under the acts of congress *a fortiori*, it is without the province of a court of law to investigate such questions in an action of ejectment.

The proof offered on this head was, that defendants were entitled to a pre-emption, and the plaintiff was not. Can this court, or any other court, reverse the decision of the register and receiver, and give title to the defendants upon their making satisfactory proof of a right to pre-emption? The United States, the proprietor of these lands, have declared that the right to a preference in the purchase of their lands, shall be determined by certain officers selected by them, and that such right shall be proved to the satisfaction of such officers. Will it then answer to prove it to the satisfaction of this court?

This language of the acts of Congress granting pre-emptions, is obviously the result of deliberate caution, and its continued adoption, without the slightest change, from 1814 up to the passage of the last law on the subject, indicates the importance attached to it by Congress. Their action on this matter seems to be the result of a conviction that the officers to whom the sale of the public domain is entrusted, are as likely to do justice to claimants, as the State or federal courts. At all events, as the proprietor of the land, the United States had a right to prescribe the terms upon which they would sell. Individual instances of injustice and oppression may happen under such a law, but perhaps such cases are not more likely to happen as the law now is, than if an appeal from the decision of these officers was given to the courts.

A confirmation by act of Congress is not at all analogous to the privilege granted by a pre-emption law. The former conveys the title of the United States as effectually as a patent; the latter professes to give no title, not even the lowest order of title, but merely a priority of right in the acquisition of title. The first is a title, the latter is a mere privilege. If the officers, whose duty it is to take cognizance of this privilege, neglect that duty, I know of no power in the State courts to compel them. Their mistakes or frauds may be corrected by the department at the seat of the federal government; and this appears to be the only corrective where there is a wilful, or a mistaken breach of duty by the subordinate officers, who conduct the sale of the public lands.

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Where conflicting titles have emanated from the government, of course the courts must decide between them; but they cannot create a title in an individual, where the United States have not given any. During the existence of the pre-emption laws from 1830 to 1838, the courts might very well protect the settler in his possession, until the expiration of the time allowed him to acquire title; not because he derived any title from such laws, but because a title could not emanate during the existence of his pre-emption, to any other than himself, which would be valid until the expiration of that time, and his failure to avail himself of his privilege. But where the time has expired, and no title has been acquired, though his failure to procure a title may have been owing to the improper and illegal conduct of the officers, he is no longer within the protection of the law, and he undoubtedly no longer has any title which can be recognized in an action of ejectment.

The case of Stephenson vs. Smith is not inconsistent with these principles; that was a question of fraud in the person acquiring the legal title, whom the court therefore considered a trustee for the equitable owner.

The court, in my opinion, did not err in refusing to permit the O'Hanlons to prove up their right of pre-emption; for the same reason, the proof of the want of certain pre-requisites, among others that Perry was not a house-keeper on the land, was properly rejected. The officers, who permitted the entry, decided otherwise, and it was a question of fact for their determination.

The defendant also offered to prove that the plaintiff had no claim, in consequence of which the land in controversy had been reserved from sale. If so, he was not within the provisions of the act of 1832.

The testimony in relation to Basil Valle's claim under the *old mine* concession, and Perry's claim under Valle was introduced, as I suppose, for the purpose of showing that Perry had no claim to the 553 acres which he entered at the land office; that this land had been in fact reserved for some other purpose, or on account of some other claim. The same purpose seems designed by the evidence of Perry's confirmation to the lot, and out-lot in Mine a Breton. The relevancy of this evidence is exceedingly obscure, to say the least of it, and I am not satisfied that the question is one which could be enquired into. The register and receiver in granting the pre-emption, had necessarily to pass upon these questions. Under the act of the 9th July, 1832, it was made the duty of the recorder and commissioners to transmit to the register of each land office, monthly abstracts of relinquishments of

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claims in his district, showing the date of the claim, the names of the present and original claimants, the quantity of the claim, and its designation by section, township and range. Those returns would show much more satisfactorily than such negative evidence as the defendants attempted to introduce, whether the register acted in conformity to law in these particulars. It is clear, that if there was no such claim on the part of the plaintiff, he did not come within the provisions of the law. But, however this may be, the last objection raised by the defendant's instructions, was I think available.

The proviso of the 3d section of the act of July 9, 1832, was a special pre-emption law; it provided that actual settlers, being housekeepers, upon such lands as are rejected, claiming to hold under such rejected claim, or such as may waive their grant, shall have the right of pre-emption to enter, within the time of the existence of this act, not exceeding the quantity of their claims. This provision allowed the claimants two years from the date of the organization of the board, to enter the land claimed. The pre-emption act of 1838, had no relation to this act; the terms upon which pre-emptions were allowed, and the amount of land allowed the settler, differed most materially from the provisions of the act of 1832. Perry entered the land in controversy under the act of 1832, on the 26th Nov., 1839, several years after the expiration of the law. The entry, on its face, purports to be made by virtue of the pre-emption act of 1832, and purports to have been made on the 26th Nov., 1839. It is, therefore, *prima facie*, made without any authority. This is a question of law, which the courts can determine, and not a question of fact, passed upon by the receiver and register. In such a case the presumption which usually arises that the pre-requisites of the law have been complied with, cannot be indulged; for the certificate carries on its face the marks of illegality. It is apparent that it was issued at a time when the officers had no power or authority to issue such a certificate, and it is not therefore *prima facie* evidence even against a mere occupant.

I admit that the United States may disregard the illegality of the certificate, and ultimately give the title by patent to the plaintiff; but so long as the plaintiff has no other evidence of his title than this certificate it is, in my opinion, insufficient to maintain his action.

I think the judgment should be reversed.

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RICHARDSON, ET AL. VS. ROBINSON, ET AL.

When it is attempted to set up an equitable title against a legal title, accompanied with long continued possession, the equity must be clearly proven.

APPEAL from Howard Circuit Court.

LEONARD & CLARK, for Appellees.

In support of the decree of the circuit court, the counsel for the appellees will insist upon the following :

POINTS AND AUTHORITIES.

1. The defendants, and their ancestors, had the legal title twenty, and the possession thirty years, and they will not be disturbed by this court, unless the complainants establish a clear equity in themselves, to be clothed with the legal title. Bird, et al. vs. Ward & Cravens, 1 Mo. R. 281, new publication.

2. Richardson, the ancestor, had a vendible interest in the land in 1815, under the pre-emption law of 1814, and the proof establishes that he sold this interest in the former year to Christopher Burckheartt, and thereby extinguished all equitable right in himself, and his heirs, to the land in question. Bird, et al. vs. Ward and Cravens, 1 Mo. R. 281, re-publication ; pre-emption law of 5th Feb., 1813; 1 U. S. land laws 225; pre-emption law of 12th April, 1814 ; 1 U. S. land laws 244, sec. 5.

3. The copies of deeds from the recorder's office of Howard county, were competent evidence in the cause, and rightly received by the Court. Acts of 1838-9, page 42, title evidence, sections 10 and 11. Moss vs. Anderson, 7 Mo. Rep. 338.

4. If this be otherwise, and these deeds are struck out of the proof, yet a parol sale of land in 1815 was valid, and the parol proof establishes the fact of the sale to Burckheartt. Territorial acts, title frauds and perjuries, p. 439; title laws, p. 436.

NAPTON, J., delivered the opinion of the court.

This was a bill in chancery, brought by Christopher Richardson and James Barton, (by his next friend,) heirs at law of James Richardson, deceased, to compel the conveyance of a legal title to a quarter section of land from the heirs of Nicholas S. Burckheartt, deceased.

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The bill alleges that James Richardson, the ancestor, cultivated the land in controversy in 1811 and 1812, and that the pre-emption right, under the act of congress of April 12th, 1814, was granted to the legal representatives of said Richardson, who were both infants, and one of them a married woman; that the purchase money was paid by Christopher Burckheartt, deceased, and by mistake or fraud, the land was patented to Nicholas S. Burckheartt, deceased, as assignee, &c.

The bill charges that the complainants never did assign their interest to N. S. Burckheartt, or any other person; that one of the complainants, (Christopher Richardson,) and the mother of the other, Elizabeth Barton, (formerly Elizabeth Richardson,) were infants at the time the pre-emption was allowed; that the application of the said N. S. Burckheartt, was pretended to be for their benefit, but that a patent for the land was fraudulently procured to himself, and that he took possession and held it until his death.

The bill alleges that the purchase money was intended by Christopher Burckheartt, deceased, as a donation to the heirs of said James Richardson, and prays for a decree of title.

The answers of the several defendants, who are heirs of N. S. Burckheartt, set up, that N. S. Burckheartt has been in possession of the land since 1815, claiming it as his own, and deny that the purchase money was paid by C. Burckheartt, the father of the said Nicholas S., or that it was a donation to the heirs of James Richardson. The defendants aver, that the land was purchased by Christopher Burckheartt, before the pre-emption right was allowed, and by him sold to N. S. Burckheartt for valuable consideration; that C. Burckheartt took possession immediately after his said purchase, and that afterwards N. S. Burckheartt took possession, and continued in possession until his death; that neither said Richardson nor his heirs denied the title of said N. S. Burckheartt, in his life time, and that said Nicholas paid the purchase money to the United States out of his own money, and for his own use and benefit.

The defendants insist on adverse possession since 1815, and rely upon the record of the deeds from James Richardson to C. Burckheartt, and from C. Burckheartt to N. S. Burckheartt.

The evidence on the part of the complainants established, that their ancestor, James Richardson, moved to the Boons' Lick in Howard co., in the year 1811; that he cultivated a small portion of ground, and established salt works; that in 1812 he was joined in the salt making business by one Alcorn, but their partnership was discontinued in the same year; that about this time Christopher Burckheartt, whose daugh-

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ter said Richardson had married, moved up to the "lick," and with his family occupied the same cabins with Richardson, and carried on the salt making together, until the incursions of the Indians drove them in to the forts; that they returned in 1815, that in the fall of that year Richardson, with a view to benefit his health, left for the lower country, and died without ever returning.

Several witnesses testify, that Richardson declared he had sold his land to Christopher Burckheartt, and also that C. Burckheartt said he had bought it, and assumed the payment of some of Richardson's debts.

Whilst Richardson was in possession, and previous to the time he was joined by C. Burckheartt, Nicholas S. Burckheartt came out to this country from Kentucky, and worked at the lick, with his brother-in-law, as an ordinary hand. It also appears, that in 1815, and perhaps for some years thereafter, said N. S. Burckheartt was not the ostensible owner of any considerable property, but was sheriff of Howard county, and held some other lucrative offices.

It was also proved that Nicholas S. Burckheartt lived at the lick, from 1815 until he married, and that he claimed the lick as his property, though his father and mother continued to reside thereon for several years; and up to the time of the bringing of this suit his mother still lived on it. The money to enter the land, at least a portion of it, was advanced by Christopher Burckheartt, the father. The last payment was made by N. S. Burckheartt, and the father Christopher Burckheartt, who was present when the payment was made, was heard to say that the land belonged to said Nicholas S.

Drake, a witness for complainants, testified that Christopher Burckheartt had bought of Richardson, and that C. Burckheartt had assigned all his interest to Nicholas, on condition that he, Nicholas, should pay to Richardson's heirs, whenever they became of age, whatever the land was worth. In 1825, Christopher Burckheartt and Nicholas S. came to witness, and told over their contract, which was as above; that Nicholas S. Burckheartt often told witness that he was indebted to Christopher Richardson for the land, and a few weeks before his death, stated that all his land business was settled, if Christopher Richardson's land was only paid for; that he had not hitherto paid, because he was afraid Christopher Richardson would ask too much; that witness had signed C. Richardson's right in 1825, as guardian, at the request of Nicholas S. Burckheartt; that the estate of Barton, husband of Elizabeth Richardson, and father of the complainant James Barton, was in debt to Nicholas S. Burckheartt; that witness had signed away the

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right of said Christopher Richardson, because of the conveyance from Christopher Burckheartt to said Nicholas.

The transfer from Roger Barton and Elizabeth Barton, was acknowledged before a justice of the peace, on the 17th May, 1819; that from Christopher Burckheartt and Christopher Richardson, (by his guardian D. R. Drake,) was made on the 8th April, 1825, and acknowledged before John Miller, register of the land office.

The defendants gave evidence of repeated acknowledgments made by Christopher Burckheartt of the ownership of his son, Nicholas S., and acts of ownership on the part of said Nicholas. The defendants also offered in evidence, the record copy of a conveyance from James Richardson to Christopher Burckheartt, dated 13th April, 1815, and an assignment of the same from C. Burckheartt to N. S. Burckheartt, dated 25th July, 1815, acknowledged and recorded on 9th Feb'y, 1820, before Gray Bynum, the clerk of Howard county. Before offering it as evidence, the defendants proved that diligent search had been made for this deed, but it could not be found; they also introduced two subscribing witnesses, but neither of them had any recollection of the matter. The court admitted the deed in evidence.

Upon the final hearing, the court dismissed the bill, and from this decree the complainants appeal.

In this case an equitable title to land is set up in opposition to a legal title accompanied by long continued possession. The principles of natural equity coincide with the rules by which courts of chancery would be governed in such a case, in requiring the equitable title to be satisfactorily established before the application can be sustained.

Much of the evidence in this cause was entirely foreign to the merits; we allude to so much of it as tended to show an equitable title in the heirs of Christopher Burckheartt.

The equitable title of Richardson's heirs, as it appears in evidence, is supported principally by the attempted transfers of the title in 1819, and in 1825, the invalidity of which is insisted on, and by the deposition of David R. Drake.

To rebut this equity, the defendants rely upon the conveyance from James Richardson to Christopher Burckheartt, in 1815; and secondly, upon the proof of a parol sale, if that deed be held inadmissible.

Whether a party who insists upon a conveyance by deed, can be permitted after failing to prove his deed, to show a parol sale, in cases where a transfer could legally be made, either by deed or by parol, is a question which we do not think necessary to be decided. *MaFaden v. Rippey*, 8 Mo. Rep. 738. If the record of the deed from Richard-

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son to Burckheartt was properly admitted, it certainly goes very far to disprove the existence of the equitable title which the bill sets up in the heirs of Richardson. The admissibility of this deed is, therefore, considered the most important point in the case.

By the act of Dec. 23d, 1815, the clerks of the circuit courts were authorized to take the acknowledgment and proof of deeds, and by the act of Feb. 1, 1817, all deeds for land, proven and acknowledged before any competent authority, were required to be recorded within three months from the date thereof, in order to be good against a subsequent purchaser. The conveyance from James Richardson to Christopher Burckheartt, was executed in April, 1815, and recorded in Feb. 1820, the clerk of the circuit court of Howard county having taken the acknowledgment in due form of law.

The 10th section of the act of February 1, 1839, permits a deed, acknowledged, proved and recorded according to law, (that is, the law in force at the time of its acknowledgment,) though it may not have been recorded within one year from its date, or twenty years before it is offered to be read in evidence upon *proof of such facts and circumstances* as, together with the certificate of acknowledgment and proof, will satisfy the court that the person who executed the instrument, is the person therein named as grantor. The next section provides, that in cases where the original is lost, the record copy may be received in evidence, upon *the same proof* being made as is mentioned in the preceding section to authorize the reading of the original.

The copy of the deed from Richardson to C. Burckheartt, comes within the foregoing provision, if the facts and circumstances proved on the trial were sufficient to warrant the court in believing that James Richardson, who is named as the grantor, was the identical person who executed this deed. The subscribing witnesses were called, but as might have been expected, they had no recollection of having ever witnessed the deed. The deed had been executed more than twenty-five years before the trial, and how few would recollect an occurrence of such a character at such a distance of time. The clerk who took the acknowledgment nearly five years later, did not remember the part he had taken in the transaction. But it was proved that Richardson, shortly after the date of this deed, left the land, and that Burckheartt took sole and exclusive possession, and claimed that he had purchased it. It was also proved by one witness that previous to Richardson's departure for the lower country, he told witness that he had sold out to Burckheartt, and being indebted to witness he was assured that Burckheartt would pay him, and that Burckheartt did accordingly as-

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sume to pay the debt. There were facts and circumstances which, in our estimation, warranted the court in considering the identity of James Richardson with the grantor in this deed as sufficiently proved to let the copy in evidence.

The testimony of the witness, Drake, is not so easily reconciled with the appearance which these conveyances give to this transaction. This witness, as guardian of Christopher Richardson, had conveyed, or attempted to convey, all the right of said Richardson to the land in controversy in 1825; this he did as he alleges, because of the conveyance from Christopher Burckheartt to Nicholas S. Burckheartt. It is to be remarked that all the conveyances, or attempted conveyances, either by James Richardson, the ancestor, or by his children, are *absolute* on their face. Admitting that these attempted transfers from Christopher Richardson by his guardian, and from Elizabeth Barton, were absolutely void, yet it is singular that the witness, Drake, should have made himself a party to such a transfer, absolute on its face, with a knowledge that the land had been originally conveyed to Christopher Burckheartt, and by him to his son Nicholas, *in trust* for the heirs of J. Richardson. Conversations such as the witness testifies to, with Nicholas S. Burckheartt before his decease, may be so easily misunderstood, that we do not think that they could, under any circumstances, outweigh the recorded deeds, the oral testimony of other witnesses, and an undisturbed possession of thirty years. It may be, that Nicholas S. Burckheartt considered himself under some obligation, through feelings of kindness and relationship (for the complainants were his sister's children) to make them some compensation for their father's land, which had doubtless been purchased at a small price, and had perhaps very much appreciated in value. Or it may be that a doubtful title might induce him to make propositions for compromising the claims of Christopher Richardson. Such propositions cannot be regarded as an acknowledgment of Richardson's title.

This last idea appears to be confirmed by the testimony of Elizabeth Burckheartt, the mother of Nicholas, and grandmother of the complainant, Christopher Richardson. She states that she heard Nicholas S. Burckheartt say, one or two years before his death, that he wished he had purchased Richardson's *claim* to this land, and asked her at another time, if she knew how much said Christopher would take for his right, &c.

Upon the whole case, we are satisfied that the circuit court properly dismissed the bill, and the decree is therefore affirmed.

Riney vs. Vanlandingham.

RINEY vs. VANLANDINGHAM.

1. In an action for malicious prosecution, the testimony of defendant before the officer is not admissible, unless it appear that the facts testified to were known to the defendant alone.
2. The declarations of a party not made under oath are not admissible to corroborate his evidence given on oath.
3. Malice, as well as want of probable cause, is necessary to sustain an action for malicious prosecution.
4. It is the duty of the plaintiff in error to shew by his bill of exceptions the errors of the inferior court. The presumption is in favor of the judgment of that court.

ERROR to Scotland Circuit Court.

CARTY WELLS, for Plaintiff.

1. The evidence was not sufficient to prove either malice or want of probable cause. The weight of evidence is decidedly the other way; therefore a new trial should have been granted.

2. Plaintiff's own statement to Hickman, Riney not being present, was illegal evidence. He could not in that way make evidence for himself.

3. Riney's evidence before the justice ought to have been admitted. The question was not what Vanlandingham swore, but whether what he swore was true. If the two Andersons and Rice were not present at the alleged conversation, then no one was present but plaintiff and defendant; and if so, from policy, and for his own protection, Riney's evidence before the justice ought to have been received.

If these persons were present, then the statement of Vanlandingham is untrue, and the case was not made out. The statement of R. to V. that, "what he had sworn was true, or that he had went it like a man," was evidently ironical, and intended as a censure. R. immediately had him arrested.

4. The first instruction given for the plaintiff below is erroneous for two reasons: 1st. It goes on the ground that perjury was the charge made by Riney against V., whereas neither the declaration or the evidence show any such charge as perjury. The words spoken are not shown to have been at all material to the issue. Indeed it is no where shown, either in pleading or evidence, what the issue between Lowen and Riney was. The instruction, therefore, was wholly irrelevant. 2nd. It assumes that want of probable cause is sufficient to maintain

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the action. This is not the law. Although malice may be inferred from "want of probable cause," still it must be proven as a fact. The first instruction assumes a contrary position.

5. The second and third instructions taken together, are exceedingly erroneous. Here the court weighs the evidence for the jury, and tells them how much evidence is sufficient. The court says in substance, "the discharge almost proves the plaintiff's case. A very little more evidence is enough." 1st. A discharge does not always raise the presumption of innocence; it depends on circumstances, and in this case the circumstances were the other way; and 2nd. It is the province of the jury, and not of the court, to weigh evidence, and to decide how much is sufficient. The terms "very slight evidence," are too indefinite for a court to use before a jury. Who can tell how much "very slight" evidence is?

6. The fourth and fifth instructions are still on perjury, and are as before shown irrelevant.

7. If the instructions asked by defendant were given, they are utterly inconsistent with those given at the instance of the plaintiff, and this is error. The jury could not know which to regard; one set requires the proof of both malice and want of probable cause; the other set requires only want of probable cause. If not given, it was error to refuse them; they are clearly legal.

8. But in addition to the above points, plaintiff insists that Riney's affidavit charged no crime, and that no warrant should have been issued. The affidavit containing no charge of crime, the justice had no authority to issue his warrant. Is Riney blamed for the unlawful act of the justice?

The declaration contains no cause of action. Can a verdict and judgment on such a declaration be sustained?

GLOVER & CAMPBELL, for Defendant.

The testimony was conflicting. The jury might well have given the verdict, and it is against the practice of the court to disturb it; 6 Mo. Rep. 61.

The defendant, in an action of this sort, is never allowed to introduce his own testimony on the trial of the prosecution, except when no other person was present at the commission of the alleged offence; here the offence was charged to have been committed at the court house, in the presence of many persons; 2 Mo. Rep. p. 181; 6 ib. p. 41; 4 Phillips Ev. p. 259.

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The court committed no error in instructing the jury, that the discharge of the plaintiff by the justice was a circumstance tending to show the want of probable cause, and that slight evidence in addition thereto would be required of the plaintiff in the absence of all repellant testimony on the part of the defendant ; 8 Mo. Rep. 342.

Where there has been no probable cause for the prosecution, express malice need not be shown. In such case the law presumes malice ; 8 Mo. Rep. 342; 2 Tuck. Com. 64 ; 4 Lit. 335 ; 1 Marsh. R. 224. The defendant's affidavit could not be evidence for him. The law compels the plaintiff to introduce it ; he can in no other way prove the prosecution. We have just seen that the testimony of the defendant, even where the plaintiff has cross examined, cannot be evidence against the plaintiff ; and if not, upon what principle could his ex-parte affidavit come in ?

NAPTON, J., delivered the opinion of the court.

Vanlandingham brought his action against Riney for a malicious prosecution, and obtained a verdict and judgment.

The ground work of this action originated in a suit between Riney and one Lowen, in which suit Lowen was the plaintiff. Upon the trial of this suit of Lowen vs. Riney, Vanlandingham was examined as a witness, and testified that Riney, shortly after the affray between him and Lowen, had said to him : "*Bill*, I have whipped the old stud ; I have whipped him like damnation," meaning thereby that said Riney had whipped said Lowen. This conversation Vanlandingham said took place at the house of Elijah Anderson, in the presence of said Elijah, and Willis Anderson, and Plim. Rice. Shortly after this trial, Riney made affidavit before a justice of the peace, charging Vanlandingham with perjury in making this statement. A warrant was issued, and Vanlandingham was arrested. An investigation took place, and Vanlandingham was discharged.

For the proceeding on the part of Riney, the present action was brought.

On the trial, the plaintiff proved the proceedings before the magistrate—the affidavit, warrant, arrest and acquittal ; and further proved that Riney had boasted of having *whipped* Lowen to others, in language very similar to that attributed to him by Vanlandingham. The plaintiff also proved that Riney was present at the trial, and after hearing Vanlandingham's evidence, had observed to a bystander that "Vanlanding-

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ham had sworn to the truth, *or* had went it like a man ;” and the witness did not think the remark *ironical*.

The defendant proved by Elijah Anderson, that he (Anderson) did not hear any such conversation between Vanlandingham and Riney, as Vanlandingham had testified to ; and that they were not very friendly. The same statement was made by W. Anderson ; P. Rice, it was proved, had died before the trial.

Defendant also proposed to use as evidence his own statements made before the examining magistrate ; but this was denied, and exceptions were taken.

The plaintiff in rebuttal then proved that Vanlandingham had made to a witness, just before the trial, the same statement he made on oath at the trial, in almost the same language ; and that Vanlandingham had desired witness not to mention it, as he (V.) did not wish to be a witness, on account of the unfriendly feeling existing between him and Riney. This testimony was objected to ; but it was admitted and no exceptions were taken.

The court, at the instance of the plaintiff, gave the following instructions to the jury.

1. That if the jury believe from the evidence in the cause that the defendant caused the plaintiff to be arrested on the charge of perjury, without having probable cause of the plaintiffs being guilty of wilful and corrupt perjury, that they should find a verdict for the plaintiff.

2. That the discharge of the plaintiff by the justice who examined the charge against him, is one circumstance tending to prove the want of probable cause for the arrest and prosecution.

3. That slight evidence on the part of the plaintiff to prove want of probable cause for the arrest of the plaintiff, after his acquittal, is sufficient, unless rebutted by evidence on the part of the defendant.

4. That if the jury believe from the evidence, that the defendant had not *probable cause* for the arrest of plaintiff on the charge of *perjury*, that in that case no express *malice* need be proved by the plaintiff, to entitle him to a verdict.

5. That if the jury believe from the evidence that if the defendant had not *probable cause* for charging and arresting the plaintiff for perjury, that they should find for the plaintiff, and assess such damages as they may think from the evidence the plaintiff has sustained from the prosecution, either to his person, his feelings, his property or his character.

That the affidavit of Riney before the justice of the peace, is not evidence for Riney in this cause, and cannot be taken into consideration by the jury in making up their verdict.

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The following instructions were asked by the defendant, to the giving of which objections were made :

1. That in this case, it is not necessary to prove perjury of plaintiff, and if there was any probable cause for the prosecution, they must find for the defendant.

2. That plaintiff must prove both *malice* in defendant, and also want of *probable cause* for the prosecution.

3. That the acquittal by justice is not sufficient in itself to show the want of probable cause.

The motion for a new trial, in addition to the usual grounds, distinctly relied on the following points: The instructions given in behalf of plaintiff; the admission of the warrant issued by the justice; and the admission of Vanlandingham's statements to sustain his oath; and the rejection of Riney's affidavit, and oral testimony before the justice, as evidence in Riney's favor.

The motion was overruled, and the cause comes here by writ of error.

One of the principal objections insisted on, to the action of the circuit court, is the exclusion of Riney's testimony before the magistrate as evidence in his favor. In this, the decision of the circuit court was conformable to the opinion of this court in the case of *Hickam vs. Griffin*, 6 Mo. R. 41. The rule as there stated, with its qualifications, appears to be sustained by *Phillips*, (1 Phil. Ev. p. 71,) and *Starkie*, (2 Stark. p. 681,) and *Greenleaf*, (Green. Ev. 398.) The rule seems to have been adopted without qualification by the supreme court of Tennessee, in the cases of *Moody vs. Purden*, 2 Hay. 29, and *Scott vs. Wilson*, Cooke 315. Upon what grounds this opinion was based, and under what circumstances the evidence was admitted, we are not apprised, those reports not being accessible. The case now under consideration does not come within the reason of the rule, stated by Lord Holt in *Johnson vs. Browning*, 6 Mod. R. 216, nor is it affected by the opinion of this court in the case of *Hayes vs. Waller*, 2 Mo. R. 222. In this last case, there was a charge of hog stealing, and no one but the prosecutor was present when the offence was committed; his testimony before the magistrate was therefore admitted to show want of probable cause, *ex necessitate rei*. Here the statement of Riney was made, as Vanlandingham testified, in the presence of three witnesses, two of whom the defendant examined, and the third was dead. The two witnesses examined said they had heard no such statement by Riney, and if the jury believe these witnesses, it would seem that a probable cause was made out; and the testimony of the defendant would have added no weight to the case.

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The testimony in relation to Vanlandingham's statements not under oath, corroborative of his statement on the trial of the case of Lowen vs. Riney, was inadmissible.

It is well settled in England, that what a witness said not upon oath, is inadmissible to confirm what he has said under oath; *Rex. vs. Parker*, 3 Doug. 242. In the case cited, Buller, J., denied the doctrine of *Luthrell vs. Reynell*, 1 Mod. 283, and the authority of Hawkins, (2 Hawk. P. C. 431,) who had maintained the competency of such proof. In accordance with this decision of Buller, which he also asserts in his treatise, (Buller's Nisi P. 249,) is the opinion of Starkie, Phillips, and Greenleaf. Starkie says, "that the witness having given a contrary account, although not upon oath, necessarily impeaches either his veracity or his memory; but his having asserted the same thing does not in general carry his credibility further than, nor so far as, his oath." In Greenleaf's Evidence the same doctrine is stated: "Evidence that the witness has on other occasions made statements similar to what he has testified in the cause is not admissible, unless, where a design to misrepresent is charged upon the witness, in consequence of his relation to the party, or the cause; in which case, it seems, it may be proper to show, that he made a similar statement before that relation existed." Greenleaf's Ev. p. 521.

In relation to this sort of evidence, Phillips makes the following pertinent remarks: "It may be observed on this kind of evidence in general, that a representation without oath, can scarcely be considered as any confirmation of a statement upon oath. It is the oath that confirms, and the bare assertion that requires confirmation. The probability is, that in almost every case the witness who swears to certain facts at the trial, has been heard to assert the same facts before the trial; and it is not so much in support of his character that he has given the same account, as it would be to his discredit that he should ever have made one different. If a witness has made a statement a hundred times in one way, and a hundred times another way, directly contrary, the only inference is, that he is utterly destitute of credit." 1 Ph. Ev. 308.

There are, it is true, very respectable authorities which maintain the admissibility of such testimony. *People vs. Vane*, 12 Wend. 79; *McNally's Ev.* 378; *Cooke v. Curtis*, 2 Harr. & M. H. 93; 1 Serg. & Rawle, 536; 2 Wash. R. 148; 1 Peter's C. C. R. 203. But we are disposed to consider the doctrine of the elementary writers, above referred to, as the correct and safe rule. Testimony of this character is very easily

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manufactured, and it is especially objectionable in a case like this, when it is made *post litem motam*.

But the defendant acquiesced in the decision of the circuit court, and it is therefore an error which this court cannot correct.

As to the instructions to the jury, the bill of exceptions does not show what instructions were given. It is stated that those asked by the plaintiff were given, but it does not appear whether those asked by the defendant were given or not. If the instructions given at the instance of the plaintiff were clearly illegal, this defect in the bill of exceptions would not prejudice the defendant's right to a reversal of the judgment. But the only substantial objection to these instructions is, that they do not seem to apprise the jury, with sufficient distinctness, of the necessity of finding malice, in order to a recovery by the plaintiff. This perhaps, is inferable from the fourth instruction. But malice, as well as want of probable cause, is essential to maintain an action for malicious prosecution, and this the defendant had a right to have placed before the jury, with such clearness that they should not be misled. Had the plaintiff's instructions alone been given, the defendant would have a just cause of complaint, but the most natural construction of the bill of exceptions is, that the defendant's instructions were also given, and if so there could be no objections on this ground. It devolves on the plaintiff in error to show that the court erred; the presumption is in favor of the legality of the judgment, and if any doubts arise from the obscurity of the case stated, the defendant in error has the benefit of them.

The judgment of the circuit court will therefore be affirmed.

STEELE vs. PARSONS.

Parsons bought a tract of land from Gibson, for which he paid \$50, and gave his note for \$300. At the same time P. executed to G. a bond, conditioned to re-convey the land if G. should refund the \$50, and deliver up the note, on a certain day. The note was fraudulently assigned by G., and while thus in equity belonging to G., Parsons was garnished on a judgment against G. After the garnishment the note and defeasance were assigned to Steele. This was a bill filed by Steele to compel Parsons to re-convey.

Held:

That Parsons being compelled to pay the judgment against him, as garnishee, the note in equity being the property of G. at the time of the garnishment, any subsequent transfer cannot, in equity, affect the right of Parsons to use the judgment against him as a defence, and the bill ought to be dismissed.

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APPEAL from Lincoln Circuit Court.

CARTY WELLS, for Appellant,

Makes the following appoints:

1. The deed and defeasance made at the same time, taken together, have the effect of a mortgage. Gibson having the power to redeem at any time before January 1, 1840, by refunding the money and returning the note.
2. Gibson's sale and assignment to Steele, invested Steele, in equity with the same right.
3. Parsons was in no sense the debtor of William Gibson, until the first January, 1841, when the bond fell due, and the power to redeem ceased.
4. Before that period the money and bond were tendered to him by Gibson's assignee.
5. There was fraud between Parsons and Joseph Gibson, to defeat the operation of the defeasance.

W. M. CAMPBELL, for Appellee.

On behalf of Parsons, I make the following points:

1. Parsons was indebted to Wm. Gibson, on the 2nd of June, 1840, the time when he was summoned as garnishee, as said Wm. Gibson was then the real owner and holder of the note for \$300.
2. That fact having been judicially determined by the finding and judgment of the circuit court, it cannot be reversed collaterally in this suit.
3. Wm. Gibson having fraudulently withheld his defeasance bond from record, and having thus caused Joseph Gibson to have Parsons summoned as garnishee, could not set up that secret defeasance as a defence against the claim of Joseph Gibson, nor can any person claiming under him do the same thing either directly or indirectly.
4. It was not the duty of Parsons, when summoned as garnishee to take the place of the defendant in the execution, nor set up defences for him, nor was it his duty to become an interpleader for the benefit of third persons.
5. The tender made by Steele to Parsons, on 13th of June, 1840, and the demand of a conveyance of the land to him, was of no value whatever; because, Steele at that time had no interest in, or claim to the land, either legal or equitable, and he did not acquire any such interest

till the 6th of July following, when the defeasance bond was assigned to him.

6. Steele was fully apprised of the proceeding against Parsons as garnishee, and did not interplead, nor set up his claim, but stood by, and let judgment be rendered against Parsons without objection, and cannot now object to that judgment.

McBRIDE, J., delivered the opinion of the court.

On the 23d June, 1841, Steele filed his bill in chancery in the Lincoln circuit court, making Parsons and William Gibson defendants. The bill states that in April, 1840, Gibson being seized of a half quarter section of land lying in Lincoln county, and containing 80 acres, conveyed the same by deed to Parsons for the sum of \$350; fifty dollars of which was paid at the time by Parsons to Gibson, and the remaining \$300 secured by note payable on the 1st January, 1841. That although the deed purported on its face to be absolute, yet it was subject to a defeasance bond executed at the same time by Parsons to Gibson, by which Gibson had the privilege of redeeming the land by surrendering the note for \$300, and repaying to Parsons the fifty dollars paid, with the accruing interest at the rate of ten per cent., provided this was done prior to the first of January, 1841. That in June, 1840, complainant bought the note from Gibson on Parsons, and on the 13th day of the month he tendered to Parsons the note for \$300, the defeasance bond, and the \$50, with the interest thereon, and demanded a conveyance of the land to him, but that Parsons refused to accept the tender, or make the conveyance. The prayer of the bill is, that Parsons may be compelled to convey the land to the complainant, Steele.

William Gibson, one of the defendants, made no answer, and the bill was taken as confessed as to him.

The answer of Parsons, the other defendant, admits the execution of the deed from Gibson to himself, and of his note; and the defeasance to Gibson, but insists that the latter was a mere personal favor to Gibson, and for no other purpose. It denies any tender by complainant, but admits a tender by one Seaton, of the money, &c., but insists that he always understood that Seaton was acting for himself, and not for another, and that he knew nothing of the transfer to Steele, the complainant, until the spring of 1841, when they were for the first time shown to him by complainant's counsel. That before the pretended tender by Seaton, he had been regularly summoned as a garnishee, under an execution in favor of Joseph Gibson against William Gibson, and at the

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following August term, interrogatories were propounded to him, which he answered at the May term, 1841, admitting his having executed a note to William Gibson for \$300, and also that James Gibson had given him notice on the 3rd of May, 1840, that the note was assigned to him. He also charges that the transfer of said note by William Gibson to James, and from James to Nancy Gibson, and by her to Steele, were contrivances to prevent Joseph Gibson from collecting his debt by garnishment. He denies that William Gibson could convey any right to the tract of land in controversy, that could conflict with his title.

To this answer there was a general replication. After several continuances of the cause, on the 6th Nov. 1843, Parsons, by leave of the court, filed an amended answer, stating that after the date of his first answer, on the 22nd October, 1841, a judgment had been rendered in favor of Joseph Gibson against him as garnishee, for the full amount that was due by him on the note given to William Gibson, and making profert of the record. He also charges that said Steele was well apprised of the fact that he had been summoned as garnishee, and had answered, and that proceedings were in progress to obtain a judgment in favor of said Joseph Gibson against him as garnishee, and that he took no steps to interplead, or claim said note or debt, or set up his claim.

At the same term, the complainant filed an amended bill, in which he charges that Parsons was well apprised of the sale of said land by William Gibson to him, before he was summoned as garnishee; that he further knew that complainant had possession of the note, and intentionally concealed the fact from the court; that he fraudulently omitted to state in his answer that the note was given to William Gibson for said land, and that William had the privilege until the first of January, 1841, to redeem it; that he concealed from the court the fact that this bill in chancery had been brought; and that he might have successfully defeated the claim of Joseph Gibson, if he had taken the proper steps to do so. He also charges that subsequent to the judgment in favor of Joseph Gibson, against Parsons as garnishee, an agreement was entered into between Joseph Gibson and Parsons, by which Joseph agreed to release Parsons from said judgment, if he should lose the land in this suit; but that the agreement was made verbally before the judgment. At the same term of the court, Parsons filed his answer to the amended bill, denying all fraud or improper conduct on his part, and recapitulating the different steps that had been taken in the proceedings of garnishment; states that as garnishee he answered according to the facts as they were known to him, and sets forth his answer; that in his an-

swer he did not set up the transfers to Jas. Gibson and Nancy Gibson, because he considered them fraudulent and void, and believed that the note still belonged to William Gibson; that at the time of his answer as garnishee he had never heard of the claim of Steele to the note, nor did he hear of it until this chancery suit was brought; that he did not set up the claim of Seaton because he considered it fraudulent, and that it was a part of the scheme concocted to cheat Joseph Gibson out of the amount of his judgment against William Gibson, and that he did not wish to become a party thereto. He charges that Steele and Seaton were both well apprised of the nature of Joseph Gibson's claim against William Gibson, and of the fraudulent attempts to cheat Joseph Gibson; that they well knew of the fraudulent assignment to James Gibson, and Nancy Gibson, and that the sale of the note and of the land to Steele, was a part of the same fraudulent attempt to defraud Joseph Gibson, and that Steele was well apprised of that fact; that he did not mention this suit in his answer because it was not then brought. He denies that he could by any proper means have defeated the claim of Joseph Gibson, and that he was not bound to enter into the foul and fraudulent conspiracy for that purpose; that after the judgment in favor of Joseph Gibson, after the execution was issued thereon, and after a part of the money had been paid, Joseph Gibson did execute to him a paper promising to release said judgment, and refund the money paid if he should lose the land; he denies that there was any previous understanding or agreement to that effect; that against the claim of Joseph Gibson, he employed competent counsel, and made all the defence that the facts would warrant. He denies that the land was worth five or six hundred dollars, but that on the 8th January, 1841, after William Gibson's right to redeem had expired, he offered to let Seaton have the land for an advance of fifty dollars on what it had cost him.

To this answer there was a general replication. Joseph Gibson, who was made a defendant to the amended bill, failed to answer, and it was taken as confessed as to him.

Upon this state of pleading the trial took place.

The following was the evidence in the cause :

A deed from William Gibson to Jacob M. Parsons, conveying the west half of the northeast qr. of section 31, town 51, range 2, containing 80 acres, for the consideration of \$350, dated the 8th April, 1840, and recorded on the same day. A defeasance bond from Jacob M. Parsons to William Gibson, dated on the same day, and containing the agreement set out in the bill and answer, with an assignment thereon from William

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Gibson to David Steele, for the consideration of \$400, and dated 6th July, 1840.

A note for \$300, payable on the first of January, 1841, executed by Jacob M. Parsons to William Gibson, and dated 8th April, 1840, with an assignment from William Gibson to James Gibson, dated 2nd May, 1840, and assigned by James Gibson to Nancy R. Gibson on the same day, and assigned by Nancy R. Gibson to David Steele, dated 4th June, 1840.

A notice from James Gibson to Jacob M. Parsons, dated the 2nd May, 1840. William Seaton testified that in the month of June, 1840, Steele bought the land mentioned in the bill from William Gibson, paid a part of the purchase money in hand, and gave his note for the balance to be paid in a short time, and he afterwards understood it was all paid. Steele agreed to give \$400 for the land; three hundred and fifty to Gibson, and pay Parsons \$50 with interest. At the time of the purchase, William Gibson had in his possession the note of Parsons for \$300. It had been assigned to James Gibson by William, and by James Gibson to Nancy Gibson. He took the note to Nancy Gibson in company with Steele, and she assigned it to Steele in his presence. On the 13th of the same month he got Philip T. Wells to go with him to Parsons, and then tendered to him, as the agent of Steele, the note of \$300, the defeasance mentioned in the bill, and also \$54 in silver. He or Wells told Parsons that Steele had purchased the land of William Gibson, and the money, note and defeasance were laid on a block and offered to Parsons, who made no objection to the papers or money, but said he would wait until the fifth Monday in August. He identifies the defeasance filed as an exhibit, with the one he offered to Parsons, but does not recollect whether the assignment to Steele was then endorsed on it or not. Steele bought the land from Gibson in June or July, and before the tender was made to parsons; they were present and traded in person; witness never had any interest in the land or in the trade between the parties; acted only as the agent of Steele. Does not remember that Parsons objected because he had been garnisheed; remembers that he refused until the fifth Monday in August; may have said that he was garnisheed; was present when Gibson and Steele traded, but does not remember all the conversation; does not recollect that William Gibson told him how or why the assignments were made on the note; does not remember that James Gibson or Nancy Gibson told him why the assignments were made. At the time that he went with Steele to James Gibson, there was something said about Parsons having been attached. William Gibson had a horse at the same time.

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Philip T. Wells testified that on the 13th June, 1840, at the request of Wm. Seaton, went with him to witness a tender to Parsons. \$50 with interest at the rate of ten per cent. was laid down, and also Parsons's note to William Gibson for \$300. Seaton told Parsons that he acted as the agent of Steele. Parsons replied that he had been garnisheed, and did not feel at liberty to receive any part of the money. The note filed as an exhibit, the witness thinks, the same one offered to be delivered up. There was another paper or obligation presented, but he cannot say that it was the defeasance. Seaton told Parsons that Steele had purchased the land of William Gibson, and that he, Seaton, was acting as the agent of Steele. William Gibson was then insolvent. Parsons and Seaton conversed but little. Witness showed the papers and made tender for Seaton.

John McCormick testified that he was present when a writing was executed by Joseph Gibson to Parsons, by which Gibson bound himself not to push the judgment which he had obtained against Parsons as garnishee, at which time Parsons paid \$20 to Joseph Gibson, and took his note for it. The agreement was, that if Parsons gained this suit, he was to pay Joseph Gibson's judgment against him; if not, Gibson was to pay back the \$20. This was after the judgment against Parsons. Witness knows the land in controversy. Parsons does not live on it. He cultivated it two years, but has put no improvements on it. The fences have been torn away on one side, and the houses seem not to have been repaired. It was admitted that the agreement between Joseph Gibson and Parsons is not on file, and cannot be found.

James Gibson testified that when the note of \$300 was executed, William Gibson owed him \$65 and give him Parsons' note as security for the same. William assigned it to him, and he assigned it to his daughter, Nancy K. Gibson, for fear Joseph Gibson's claim would take it out of his hands before Parsons would pay it. He proposed to Parsons to lift the note for \$300, and execute to him one for \$65, the amount which William owed him; which Parsons agreed to do, but William objected, and said he would either pay witness the \$65, or give him personal security. Afterwards William came and got the note, and kept it a day or two, when he and Steele, and Seaton, came to witness' house. William said he was about to sell the land to Steele, or to Steele and Seaton, and that he wanted the note, and would give me his mare, saddle and bridle, for what he owed me. I told him that to accommodate him, I would take his offer; and did so, and gave him up the note. The parties went off to see the land, and witness loaned William the mare to ride. Afterwards, in a week or less, Seaton came back and stated that

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Steele had bought the land of William, and requested that Nancy would assign the note to Steele. Seaton said he feared Parsons would be obstinate about the matter. Nancy said she had given nothing for the note, and that she was willing to assign it if it was right. Seaton said he wanted the assignment, in order to show that Steele held the note against Parsons and not her; and she did assign it to Steele. The assignment was dated about a week back, in order to make it correspond with Steele's purchase of the land from William: thinks that when Seaton spoke of Parsons' obstinacy, he said something about garnishment, but is not certain. Sometime before this witness was at New Hope, and William Gibson requested him to try and buy a note which Joseph Gibson, his father, held on him, amounting to about \$265. He went and offered the old man every cent which the note called for on its face, including interest at 6 per cent; but he would not take it, insisting that he was entitled to ten per cent: the note on its face was only for 6 per cent. Afterwards I heard William offer to give Seaton \$50 to get a settlement with his father and get the suit out of court; and witness agreed to go William's security for the fifty dollars if the matter could be settled; but Seaton never got the settlement. Supposes that Steele knew of the debt between William and his father when he bought the land. William Sitton testified, that Joseph Gibson had judgment against William Gibson, and the execution was in his hands as sheriff when he went to the clerk's office to get a description of the land to levy on it, and there found the deed from William Gibson to Parsons. Under instructions he then garnisheed Parsons, who told him that he had received a notice from James Gibson that the note had been assigned to him. On the next day he garnisheed James Gibson, who said that he had held the note as security for a debt, but that he had given it up. Witness afterwards saw Seaton, who said that he wanted a compromise with Parsons by which Steele could get the land. Afterwards, Seaton, Gibson, Parsons and witness met at New Hope, on the 8th January, 1841, when Parsons asked the costs on Joseph Gibson's suit, and \$50 more than he had given to William Gibson; and on these terms agreed to give up the land. To this Seaton agreed, provided Steele would consent; and he paid me the costs amounting to about \$50, and took a receipt binding me to refund if Steele did not assent. Afterwards Seaton called on me, and stated that Steele would not consent or agree to the arrangement; when he paid him back his money. When the above arrangement was made, he wrote blank notes for the \$350, and gave them to Seaton. Parsons said he was willing to re-convey the land to Wm. Gibson if he would repay him the \$50, and deliver up to him his note

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for \$300; but if he conveyed the land to any other person, he would require an advance of fifty dollars; because, he said, if he sold the land to any other person he would incur some responsibility thereby, but if he conveyed it back to William Gibson he would run no risk, and he wanted to be paid for his responsibility if he incurred any. Witness says he would not have given more than \$350 for the land at the time Parsons purchased.

An execution in favor of Joseph Gibson, against William Gibson, for \$269 debt, \$36 42 damages, and \$10 91 costs, with ten per cent. interest, issued on a judgment obtained on the 8th May, 1840; and dated the 22d May, 1840. It was returned by the sheriff "no property found," &c., and that he summoned Parsons as garnishee on the 2nd June, 1840. Also the record of the proceedings against Parsons as garnishee, had in the circuit court up to the judgment, which was rendered at the October term, 1841, for the entire amount of the note and interest, given by Parsons to William Gibson, for the purchase of the land in controversy.

This being all of the evidence, the circuit court decreed a dismissal of the complainant's bill, and adjudged that each party pay his own costs; from which decree the complainant prayed an appeal to this court.

The following are the dates of the several transactions embraced in this controversy:

Deed from W. Gibson to J. M. Parsons, 8th April, 1840; note from Parsons to W. Gibson, do; defeasance from same to same, do; deed recorded, do; note assigned by W. Gibson to James Gibson, 2d May, 1840; note assigned by James to Nancy Gibson, 2d May, 1840; judgment of Jos. V. W. Gibson, 8th May, 1840; execution on same, 22nd May, 1840; Parsons garnisheed by Joseph Gibson, 2nd June, 1840; note assigned by N. Gibson to Steele, 4th June, 1840; tender by Seaton to Parsons, 13th June, 1840; assignment of defeasance to Steele, 6th July, 1840; judgment of Gibson v. Parsons, garnishee, 22nd October, 1841.

Having grouped together the dates of the principal transactions between the parties, it will readily be seen that one of two hypothesis must be true, and if either, it will render the decision of this case comparatively easy. The note of Parsons for \$300, given for the purchase of the land in controversy, was the property of William Gibson, on the 2d June, 1840, the day when Parsons was served with the garnishment at the suit of Joseph Gibson. William Gibson had the equitable title to the land in controversy, on the 8th May, 1840, the date of the rendition of the judgment in favor of Joseph Gibson against him.

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We shall first enquire and endeavor to ascertain from the evidence to whom the note of Parsons belonged, in equity, at the time when he was summoned as garnishee.

For the purpose of this enquiry, we shall commence at a period anterior to the sale of the land to Parsons. From the evidence, we learn that William Gibson, who was in doubtful circumstances, was indebted to his father, Joseph Gibson, in an amount nearly equal to the value of his land; and he was likewise indebted to James Gibson in the sum of \$65. This latter sum added to the claim first named, would make William Gibson's indebtedness, to those two individuals alone, amount to about \$378. Suit had already been instituted by the father to recover his debt, and it was probable that judgment would be obtained in a few days, which would prevent an alienation of the land, and if enforced by execution would most probably result in a sacrifice of the land. Hence we infer that William Gibson was operated upon by one of two considerations in making a sale of his land to Parsons—first a desire to baffle or defeat the claim of his father, between whom there appears not to have been a very kind state of feelings; or second, to obtain time by this arrangement with Parsons, until he could make another disposition of his land, and thereby prevent its sacrifice. Either was a fraud upon the rights of Joseph Gibson.

The sale of the land was made by William Gibson to Parsons on the 8th April, 1840, when the \$50 part of the consideration was paid, and Parsons gave his note for \$300, the remaining balance of the purchase money, payable on the 1st Jan., 1841, and also executed the defeasance bond. The deed was admitted to record on the same day. In this condition, the transaction remained; William Gibson remaining in possession of the note and defeasance until within six days before Joseph Gibson obtained his judgment, to-wit: On the 2d May, 1840, (the judgment was rendered on the 8th May, 1840,) when it was doubtless suggested to the mind of William, that the claim he held against Parsons, might or would be garnisheed by his father to satisfy his anticipated judgment. The land had been sold in time to save it from the lien of the judgment, but this new difficulty presented itself, and must be guarded against, and for that purpose it became necessary to divest himself of the legal ownership of Parsons' note. He was likewise indebted to James Gibson, who was his friend, and willing to serve him, and he could safely confide the note to him; the fact of his indebtedness to James, would also give a colorable pretence of fairness to the transfer. The note is accordingly transferred to James Gibson on the 2d May, 1840, as a security for his debt of \$65; but James having some

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misgivings as to the apparent fairness of the transactions, and fearing that Joseph Gibson might reach the note, or the balance after deducting his \$65, by garnisheeing it in his hands, immediately assigns it to his daughter Nancy. Nancy paid no consideration for the assignment, and could only hold the note in trust for her father, provided the assignment by William to him, had been made *bona fide*; the balance of the note she would hold for William. And so the transaction was regarded by William, who refused his assent to the proposition made by James to Parsons, that he should take up the note given to William, and execute a new note to James himself. The defeasance bond was still in William Gibson's possession.

On the 8th May, 1840, Joseph Gibson obtained judgment against William for the sum of about \$313, and on the 22d of the month, sued out execution on his judgment, directed to the sheriff of Lincoln county, who went to the recorder's office to ascertain the numbers, &c., of William's land, when he learned for the first time that the land had been conveyed to Parsons.

On the 2d June, 1840, under the direction of the plaintiff, the sheriff garnisheed Parsons, and James Gibson, on the execution in favor of Joseph against William Gibson. A few days after this an arrangement is made between William and James Gibson, by which the lien of the latter to the extent of \$65, on the note of Parsons, was extinguished by the former letting him have a mare, saddle and bridle. Then the note was held by Nancy in trust, exclusively for the benefit of William.

Afterwards, say about the 10th of June, 1840, William undertook to sell the land in controversy to Steele; and to enable Steele to obtain a deed from Parsons it was deemed necessary to have the note assigned to Steele. For this purpose Nancy Gibson was called upon to assign the note on Parsons to Steele, when she replied, that as she gave no consideration for the note, she was willing to assign it to Steele, if it were right for her to do so; and on being informed that it was, she accordingly assigned it, ante-dating the assignment to the 4th June, 1840. There was then a period of upwards of one month, when a note was held by Nancy Gibson, in trust for her father, and William Gibson, and several days in which the entire equitable interest in the Parsons note, was in William Gibson alone, before its assignment to Steele, and consequently subject to the garnishment of Joseph Gibson; and being once so, for however short a period, the right to subject it in the hands of Parsons to the payment of Joseph's debts, was complete, and could not be defeated by any subsequent arrangement of William, or his trustee.

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Was Steele affected with notice of Joseph Gibson's equitable right to have the proceeds of the Parsons note applied to the payment of his judgment against William Gibson? We think the evidence abundantly establishes the fact that Steele was fully acquainted with the whole transaction, or that his agent, Seaton, was, and that Steele officiously and wrongfully participated in the devices resorted to, to defeat the claim of Joseph Gibson. At all events, the circumstances which must of necessity have come to his knowledge were of so suspicious and questionable a character as should have put him upon the enquiry, when it would have required but little discernment to have satisfied him that there was fraud and concealment in the transaction. We are of opinion then, that Steele, having willingly and knowingly entered into this transaction, so strongly characterized by fraud, has no right to the interposition of a court of chancery.

This view of the first branch of the case, renders it unnecessary to enquire whether the land was not bound by the lien of Joseph Gibson's judgment, subject to the lien of Parsons for the \$50 advanced by him to William Gibson.

The decree of the circuit court, dismissing the complainant's bill, should be affirmed, and the other Judges concurring, the same is affirmed.

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1. The circuit court has power on an appeal from a justice of the peace, to require a new recognizance to be given, where the security on the recognizance, entered into before the J. P. is insufficient.
2. If upon an examination had by the court as to the sufficiency of the security, the security is sworn, and testifies falsely, it will be perjury.
3. To constitute perjury, it is not necessary that the evidence given should be material to the main issue before the court—it is sufficient if it be material to any collateral matter or enquiry.
4. If the court have jurisdiction of the parties and the subject matter, it is not necessary that the proceedings should be strictly regular, to constitute perjury.

APPEAL from Jasper Circuit Court.

McBRIDE, J. delivered the opinion of the court.

The defendant was indicted by the grand jury of Jasper county, at

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the April term, 1844, for perjury. The indictment was found upon the following facts: Leiper sued Patten before a justice of the peace, and obtained judgment, from which Patten appealed to the circuit court. In the circuit court, Leiper filed a motion to compel Patten to give additional security in his recognizance, which coming on to be heard, the defendant Lavalley, who was the security of Patten in his recognizance, was introduced as a witness, and after being first duly sworn by the clerk of the circuit court, testified, that he, Lavalley, was worth in property, the sum of three hundred dollars, and that his entire indebtedness did not exceed ten dollars.

The defendant appeared to the indictment, and filed his motion to quash the same, assigning divers reasons therefor. His motion having been sustained, and the indictment quashed, the State took an appeal to this court.

We have examined the copy of the indictment set out in the record, and are of opinion that the first seven causes assigned, nor either of them, were sufficient to authorize the circuit court to quash the indictment; some of them appear to have been made under a total misapprehension, whilst others are mere lifeless technicalities, having no substance in them. But the eighth cause is entitled to a more grave consideration, and is as follows: "Because there is no law authorizing the circuit court to entertain a motion to compel the appellant to give additional security in a recognizance."

The eighth article of an act entitled, "an act to establish justices' courts, and to regulate proceedings therein," Rev. C. 1835, p. 369, regulates appeals from the judgments of justices of the peace, and the proceedings thereon in the circuit court. The 12th section provides that "no appeal allowed by a justice of the peace, shall be dismissed on account that there is no recognizance, or that the recognizance given is defective, if the appellant will, before the motion to dismiss is determined, enter before the circuit court into such recognizance as he ought to have entered into before the allowance of the appeal, and pay all costs that shall be incurred by reason of such defect or omission."

It is presumed that the power exercised by the circuit court, in requiring the appellant to enter into a new or additional recognizance, was under the foregoing section. It is manifest, that if no recognizance had been given before the justice, the circuit court would have ample power to require one to be entered into, or dismiss the appeal. What difference is there between no recognizance, and one wholly insufficient to secure the liability of the appellant? It may be said that the convenience, and interest of parties litigant, requires that the justice of the

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peace who tried the cause, shall take the bond, and judge of the sufficiency of the security, and that great hardships might arise, by permitting the circuit court to require a good and sufficient bond to be filed, when perhaps the appellant lives remote from the county seat, and may have no friend at hand who will go his security; and so it might operate very injuriously upon the appellee to be compelled to incur the additional costs consequent upon a trial in the circuit court, when he has no sufficient security for those costs. Rather than incur the additional costs of such trial, he might be driven to a dismissal of his action, and an abandonment of his claim. But then the statute gives the right of appeal, only on the ground that the appellant shall give sufficient security, and he has no just cause of complaint if the circuit court should compel him to do that which he should have done before the justice of the peace, and which alone entitles him to have his case re-examined in the circuit court.

A review of the history of the legislation on the subject of appeals from the judgment of the justices of the peace, evinces the desire of the legislature, that no defect, omission or error of the justice, shall operate an injury, or prejudice the rights of parties, provided it can be cured in the circuit court, before the determination of a motion to dismiss for such cause. This being the unquestioned spirit of our legislation, we cannot, without violating it, confine the power of the circuit court to defects in the form of the recognizance. Suppose the recognizance was defective in form, and insufficient by reason of the insolvency of the security, then the court would undoubtedly have the right to require the appellant to execute a new bond, good in form. Could the court reject the worthless, irresponsible security in the first bond, who had been approved of by the justice of the peace? If not, it would scarcely be necessary to amend the recognizance in form. If a security in a recognizance should become insolvent, or remove his effects from the State after he entered as security, has the circuit court no power to require a new bond to be given? Such a construction of the statute would prevent the ends of justice. But aside from these considerations, the words "defective" and "insufficient," although differing somewhat in signification, are frequently used indifferently by the legislature as meaning the same thing; and as applied to recognizances, there can scarcely be said to be any distinction in fact.

But if the foregoing exposition of the statute be incorrect, and the circuit court had no legal right to require the appellant to give an additional recognizance, because of the insufficiency of the one executed

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before the justice of the peace, how will the question under consideration stand upon general principle?

Perjury by the common law is a willful false oath, by one who being legally required to depose the truth in a proceeding in a court of justice, swears positively, in a matter material to the point in issue, whether he be believed or not; 1 Hawk. P. C. 68, § 1.

It is not every false oath which a party may take, which is regarded as perjury and punishable by law; such as oaths taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without a legal authority for their so doing; or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them; or even before those who take upon them to administer justice by virtue of an authority, seemingly colorable, but in truth unwarranted and utterly void, because they are altogether idle and inoperative.

As in the case reported in Yelverton 111, where it is said to have been resolved by all of the justices of England in the Star-chamber, in the case of one Paine, of Middlesex, who was sued for perjury in the court of Requests, on his deposition in a case there depending, where the conveyance and title of land and freehold came in question, that this perjury was not punishable; for it is but a vain and idle oath, and not a corrupt oath; because the court of Requests have nothing to do with, nor can examine titles of land, which are, real, and are to be discussed and determined in the Kings' courts. So also it is held, in 3 Inst. 166, that where the court hath no authority to hold plea of the cause, but it is *coram non judice*, then perjury cannot be committed.

But it is clearly otherwise where the individual who administers the oath has legal authority to do so, or where the court before whom the oath is taken has jurisdiction of the subject matter in controversy, and of the parties, and the evidence given is material to the enquiry before the court. The circuit court of Jasper county had, by virtue of the appeal, jurisdiction of the parties and of the subject matter involved in the controversy; and it would be unreasonable to require that all the actings and doings of the court should be in strict conformity to law, before a party can be proceeded against for perjury committed before the court. It can be no legitimate defence for a party charged with perjury, to show that the court committed error in its proceedings, provided the court had jurisdiction; and a contrary doctrine would, we think, be attended with the most immoral and injurious consequences, if tolerated; it would change the parties and the issue, and instead of arraigning and trying the perjurer for false swear-

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ing, the court would be called upon to review its own judgments and proceedings.

Neither can a party escape the penalty denounced against those who swear falsely, because his evidence was not given upon the trial of the issue between the parties litigant; for all false oaths taken, and which are material upon any and every collateral issue in the progress of a cause, are equally punishable as if taken upon the trial of the main issue. As in the case in 1 Hawk. P. C. 320, where it is said, that "any false oath is punishable as perjury which tends to mislead the court in any of their proceedings relative to a matter judicially before them, though it no way affect the principal judgment which is to be given in the cause: as where a person who offers himself to be bail for another, knowingly and wilfully swears that his substance is greater than it really is."

The ninth reason for quashing the indictment is, "because the said Clark P. Lavalley was an incompetent witness on said motion, and the court had no authority to make him testify concerning it."

There is perhaps no authority vested in the circuit court to use any compulsory means to make a security in a recognizance, testify as to the extent of his means and his liabilities; but we apprehend that all which was done in this cause was to call upon the security to justify by his own oath; and if he had not seen proper to do so, the court would have rejected him. This the court had a right to do, and if the party when called upon did testify, it cannot be said that the court made him do it, but it will be regarded as a voluntary act of his own. It would be an exceeding hard case if the court really compelled the defendant to swear, and that he had necessarily to swear falsely, and then be subject to a criminal prosecution.

For the foregoing reasons we think the circuit court erred in quashing the indictment, and that its judgment should be reversed; and the other members of the court concurring, the judgment is reversed and the cause remanded.

J. D. FULKERSON, SURVIVING PARTNER, &c. VS. AMOS BOLLINGER.

Where there is conflicting testimony, the verdict of a jury will not be set aside.

APPEAL from Ripley Circuit Court.

Fulkerson, &c. vs. Bollinger.

McBRIDE, J., delivered the opinion of the court.

Ellis & Fulkerson, partners, &c., sued David Lorens, Amos Bollinger, and Peyton R. Pitman, by petition in debt, in the Ripley circuit court, when a verdict and judgment being obtained against them, they have brought the case here by appeal.

The action was founded on the following note:

"\$1633 35-100—Cape Girardeau, August 22, 1838. One day after date we promise to pay to the order of Ellis & Fulkerson, sixteen hundred and thirty-three dollars 35-100, without defalcation, for value received, bearing interest at the rate of ten per cent. per annum.

D. LORENS, A. BOLLINGER, & P. R. PITMAN."

Before the trial of the cause, Ellis, one of the plaintiffs, and Lorens, one of the defendants, departed this life, and the process not having been executed on Pitman, the action was discontinued as to him, and revived as to the survivors.

The record does not show the state of the pleadings. The bill of exceptions shows the evidence to have been substantially, as follows:

The note as above set out, with a credit endorsed thereon for \$110 91, paid the 8th Feb., 1840, and a negro boy valued at \$800, received 20th March, 1840.

J. H. Chenoweth, a witness for the defendant, testified that in 1839, Ellis told him that he and Fulkerson had purchased of Lorens 100,000 feet of lumber at the mouth of White river, at \$15 per thousand feet, and boasted of the bargain which they had obtained; and that they would charter a boat for the purpose of bringing it up, and went to St. Louis for that purpose, but could not obtain one for less than one thousand dollars, which he thought too much, and would not give that sum.

John Lorens testified that he was employed by Lorens & Bollinger, to run plank to the mouth of White river, for Ellis & Fulkerson, to the amount of 100,000 feet, or upwards, in the year 1839, and that he delivered it there in good order. He understood that it was to go in discharge of the debt which Lorens & Bollinger owed Ellis & Fulkerson, to-wit: \$1633 35-100.

Afterwards Ellis & Fulkerson refused to take the lumber, because it was damaged after lying there—that Lorens & Bollinger never had any thing to do with the lumber afterwards. A receipt signed by N. W. Watkins, attorney for the plaintiffs, for eight hundred dollars, dated 16th June, 1841, which was proven to be in the hand writing of said Watkins.

The plaintiff then read the deposition of James Cannon, who testified

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that about the first of Jan., 1840, being empowered by Ellis & Fulkerson, he went to a point on the Mississippi river, known as Alexander's wood yard, that Alexander, as the agent of Lorens & Bollinger, showed him the lumber which was piled up on his premises, but that as it was damaged he refused to take possession of it, under his instructions from Ellis & Fulkerson, which fact he communicated to them on his return home.

This being all the evidence, the cause was submitted to the jury, who found a verdict for the defendants. Whereupon the plaintiffs filed their motion to set the verdict aside, and for a new trial for the general reasons, which the court overruled, and the plaintiffs excepted.

The circuit court was not asked to give any instruction to the jury, nor were any given. The only error complained of is the finding of the jury, and the refusal of the court to set aside the verdict and grant a new trial.

This court has heretofore decided that they will not interfere with the finding of a jury when there is conflict of testimony, inasmuch as it is their peculiar province to weigh it and draw deductions therefrom. In the case of Dooly vs. Jennings, 6 Mo. R. 63, this court say, "it is certainly the peculiar province of the jury to weigh and determine the worth of evidence, and there was evidence on both sides. That weight of evidence ought to be much the greater, which should determine the appellate court to reverse a judgment, when the circuit court had refused to grant a new trial."

And again in the case of Todd, et. al. vs. Boone county, 8 Mo. R. 437, this court held the following language, "where questions of fact have been submitted to a jury, and there is any contrariety in the testimony, this court has repeatedly avowed its determination to leave the verdict of the jury undisturbed."

The evidence in the case now before us brings it fully within the foregoing principle.

Judge SCOTT concurring, the judgment of the circuit court will be affirmed.

NAPTON, J.

Ellis & Fulkerson brought an action against Bollinger & Lorens, on the following note :

"Cape Girardeau, Aug. 22d, 1838. \$1633 35-100. One day after date we promise to pay to the order of Ellis & Fulkerson, sixteen hun-

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dred and thirty-three dollars 35-100, without defalcation, for value received, bearing interest at the rate of ten per cent per annum. Signed,
D. LORENS & A. BOLLINGER."

Ellis & Lorens were both dead before the trial, and the suit stood, at the trial, between Fulkerson and Bollinger. The note produced at the trial contained an endorsement of two credits, one dated Feb. 5th, 1840, for \$110 91—the other dated May 20, 1840, for one negro boy at \$800.

The defendant proved that some time in the year 1839, witness had a conversation with Ellis, in which Ellis stated that he and Fulkerson had purchased of Lorens, at the mouth of White river, one hundred thousand feet of plank, at \$15 per thousand. Another witness stated that he was employed by Lorens & Bollinger to raft one hundred thousand feet of plank to the mouth of White river for Ellis & Fulkerson, in 1839; that Ellis & Fulkerson refused to receive the same, because it was not in good order. The plaintiffs proved that they had refused to receive and did not receive said lumber.

The defendant had a verdict, which the plaintiff moved to set aside, as against law and evidence, but the motion was overruled and exceptions were taken.

The value of the plank was about equal to the amount called for by the note, and had it been received, was doubtless intended by both parties to have been a discharge of the note. The payments on the note in 1840, of one hundred and ten dollars at one time, and of eight hundred dollars at another time, are conclusive evidence to show, not only that the delivery of the plank in 1839, at the mouth of White river, was not a payment of the note, but that Lorens & Bollinger did not themselves so consider it.

If then this plank was brought in as a set off, they were bound to show either that it was received by Ellis & Fulkerson, or that the refusal of Ellis & Fulkerson to receive it was a violation of their contract, by reason of which it might be considered as to all intents the property of said Ellis & Fulkerson. The proof was, that it was not received, and there was no evidence whatever to show whether it ought to have been received or not. The jury, therefore, clearly erred in their application of the law to the facts in evidence before them. There was no contrariety of testimony, the witnesses on either side testifying to precisely the same fact. I am not aware of any decision of this court which, in such a case, requires this court to let such a judgment stand. *Todd vs. Boone co.*, 8 Mo. R. 431.

Finley vs. Acock

FINLEY vs. ACOCK.

A note bearing "ten per cent. interest from date," is to be construed as bearing ten per cent. per annum interest from date.

ERROR to Polk Circuit Court.

HENDRICK, for Plaintiff.

The grounds relied on by the plaintiff to reverse the judgment, are

1. That there is a material variance between the note specified in the petition, and the note read in evidence. The note specified in the petition is described as one which draws interest at the rate of ten per cent. per annum, and the note read is for the payment of four hundred dollars with ten per cent. after date. The variance fatal, as the difference is descriptive of that which is material.

2. Because it was error for the circuit court to give interest upon interest.

McBRIDE, J., delivered the opinion of the court.

Finley was indebted to Acock in the sum of four hundred dollars, and executed to him his note due one day after date, "*with ten per cent. from date,*" dated 9th March, 1839, with Joseph L. Young, L. A. Williams and Joseph Able as his securities. At the same time, the better to secure the payment of said sum of money, he made to Acock a mortgage on the tract of land upon which he resided, and which is described by its numbers, and which describes the note as above set out. Acock filed his petition in the circuit court of Polk county, praying a foreclosure of the mortgage and a sale of the mortgaged premises to satisfy his debt. The petition states that he is the owner of a note against Finley and others, as security for the sum, &c., due, &c., bearing *ten per cent. interest per annum*, dated &c., and sets out the mortgage deed, which describes the note as "*payable one day after date, for the sum of \$400, with ten per cent. from date,*" &c., dated, &c.

The defendant pleaded four several pleas; the first denies the mortgage deed; the second denies the note; the third denies that the plaintiff was the owner of the note; and the fourth denies that the defendant owed the debt. Issues were framed on these pleas, and the cause was submitted to the court. The court found the several issues for the plaintiff, and gave judgment; the defendant then moved the court for

a new trial, which having been overruled, he excepted, and has brought the case here by writ of error.

Two points are made and relied on in this court to reverse the judgment of the circuit court:

1. There is a material variance between the note specified in the petition, and the note read in evidence. The note specified in the petition is described as one which draws interest at the rate of ten per cent. per annum, and the note read is for the payment of \$400 with ten per cent. after date. The variance is fatal, as the difference is descriptive of that which is material.

2. Because it was error for the circuit court to give interest upon interest.

The variance complained of does not exist between the note read in evidence on the trial and the note described in the mortgage, for they are twin brothers, but between those two and the note described in the petition. The petition only assumes to set forth the note according to its legal effect, and not to give a literal copy. Is it so set out? The statute allows parties to contract for interest at the rate of ten per cent. per annum. Here they do contract for "ten per cent." Shall it be said to be in accordance with, or in violation of law? Is it not the duty of the courts to put that construction on the contracts of the parties which will bring them within the provisions of the statute, when it can be done without violence to the language used by them? But the universal practice in the country is to loan money at ten per cent.—for how long? Clearly for one year, and then it becomes ten per cent. per annum.

There can be no doubt as to the intention of the parties, and as little doubt as to the legal effect of the note set out in the mortgage; they are the same. The reading of the note in evidence was no way important to the plaintiff's right of recovery, for the defendant's indebtedness in all of its terms was sufficiently contained in the mortgage to have enabled the court to enter judgment.

The other point we have not the means of investigating without discussing the evidence and going into a calculation of the interest. This it was the province of the court sitting as a jury to do. The counsel have made some calculation, and say the judgment is about what it ought to be.

The other Judges concurring herein, the judgment of the circuit court is affirmed.

Glasgow & Harrison vs. Moore & Feazel.

GLASGOW & HARRISON vs. MOORE & FEAZEL.

Where there is conflicting evidence, the verdict of a jury, or finding of the court sitting as a jury, will not be set aside.

ERROR to Chariton Circuit Court.**LEONARD & BAY, for Plaintiffs.**

The verdict was clearly contrary to the evidence. The account of the plaintiffs was fully proved, and the only evidence on the part of the defendants, was the testimony of Applegate in relation to the rate of exchange. Admitting the rate of exchange to have been as stated by this witness, still there was a balance due to plaintiffs.

STRINGFELLOW & ABELL, for Defendants.

1. Plaintiffs in error cannot object in this court to any proceedings in the circuit court, unless the objections were made, and exceptions saved in the circuit court.

2. All the evidence offered by plaintiffs in the circuit court, was admitted, and all the instructions asked by them given.

3. The evidence offered by defendants was not objected to in the circuit court.

4. The 3rd instruction asked by defendants, and the only one excepted to by the plaintiffs, ought to have been given. Rev. Stat. 1835, title, set off.

5. The plaintiffs in error cannot, in this case, object to the 3d instruction. It was given to the jury, who being unable to agree upon a verdict were discharged; the cause then stood as though the jury had never been sworn. The cause then being submitted to the court, no evidence being offered or instructions asked, the court acted more as a referee than a jury.

6. The court, had it been necessary, might well have disregarded much of plaintiffs' evidence, as not entitled to credit by its own showing.

7. If the testimony offered by defendants had been objected to, it was legal testimony as going to establish defendants' off sets.

8. If all the instructions and testimony of defendants were excluded, the verdict and judgment must have been for the defendants by the plaintiffs' own showing.

Glasgow & Harrison vs. Moore & Feazel.

McBRIDE, J., delivered the opinion of the court.

The plaintiffs brought their action of assumpsit in the circuit court of Chariton county against the defendants, who pleaded non-assumpsit, and gave notice of a set off under the statute.

From the evidence in the cause, as preserved by the bill of exceptions, it appears that Moore & Feazel were largely engaged in Chariton county in the purchase of tobacco, and preparing it for the European markets. Glasgow & Harrison were merchants in St. Louis, and undertook the agency of shipment and sale of the tobacco in Europe, for which service and advancements made on account of the tobacco consigned to them, Moore & Feazel were to pay them. The account upon which the action was brought embraced transactions between the parties for more than twelve months, and amounted to upwards of thirteen thousand dollars. After the parties had closed their evidence, the plaintiffs asked and obtained two instructions from the court to the jury—the defendants asked and the court gave, at their instance, four instructions to the jury. The jury not being enabled to agree on a verdict, they were by consent of the parties discharged; and by agreement of said parties the cause was submitted to the court, who found for the defendants, and assessed their damages to \$164 75, and entered judgment for the same.

The plaintiffs filed their motion for a new trial, which being overruled, they excepted, and now bring the case to this court by a writ of error, and seek to reverse the judgment of the circuit court.

Upon an inspection of the record, it appears that no evidence offered by the plaintiffs was excluded by the court, nor was any exception taken by them to any evidence offered by the defendants.

The plaintiffs excepted in the circuit court to the third, and perhaps the fourth instructions given on the motion of the defendants; but the exception was not relied upon in this court, as they were so obviously right.

The only point then, is the supposed error in the finding of the court. To say that there was no conflict in the evidence in the cause, would look like an imputation upon the intelligence of the jury who were unable to find a verdict. The record, however, shows that there was contradictory testimony, and when that is the case, the jury have a right to canvass it, and to give to it that weight and consideration which it deserves. In drawing correct and safe conclusions from evidence, the jury and the circuit judge may have many important and signal advan-

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tages over this court, they know the character of the witnesses, see the manner in which they testify, can detect the slightest evidence of bias or prejudice, remember *all* that a witness says, whilst this court only sees what the counsel commits to paper, unaccompanied by any of the above advantages, which are so necessary in the formation of a correct judgment.

This case comes within the principle decided by this court in 6 Mo. R. 63, and 8 Mo. R. 437.

Judge SCOTT concurring herein, the judgment of the circuit court is affirmed.

CALLAWAY COUNTY COURT vs. NAT CRAIG.

1. In an action brought against one of two obligors to a bond, the co-obligor cannot be a witness for the defendant. The Stat. 1845, R. C. p. 833, which provides that a witness objected to on the ground that the *verdict or judgment would be evidence for or against him*, does not apply to such a case. That statute seems to be intended for the protection of witnesses called upon to testify against their interest, and not to authorize a witness to give evidence in his own favor.

NAPTON, J., held: That payments made by one of several obligors in a bond, would prevent the statute of limitation from running as to all.

ERROR to Callaway Circuit Court.

REED & HARDIN, for Plaintiff.

The counsel for plaintiff in error contend that the judgment of the court below should be reversed for these reasons:

1. The court below committed error in permitting Nolley to testify as a witness for defendant, he being a co-obligor with said defendant:

2. The court committed error in not granting the plaintiffs a new trial upon their motion to that effect, for the reasons therein given.

3. In a joint and several note or bond, the payment of any part of the interest or principal before the statute of limitations attaches, by one, operates in point of legal effect, as a new promise by all and each of the promisors, to pay according to the nature of the instrument. *Whitcomb vs. Whiting*, Douglass, 629; *Burleigh vs. Scottt*, 15 Eng. Com. Law Rep. 151; *Wyatt vs. Hobson*, 21 Eng. Com. Law Rep. 302; *Sigourney vs. Drury and others*, 14 Pick. Rep. 387.

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4. An acknowledgment or promise of one, out of several obligors, of a joint and several note or bond, takes it out of the statute of limitations as against the others, and may be given in evidence on a separate action against any of them, although he has made no acknowledgment or promise, and only signed the instrument as a surety. *Whitcomb vs. Whiting*, Douglass, 627; 9 Eng. Com. Law Rep. 413; 5 Binney's Rep. 198; 15 Johns. Rep. 3, *Johnson vs. Beardsdall* and others.

This court will reverse a judgment rendered upon a verdict found by the court below sitting as a jury, if said verdict be glaringly wrong. 9 Mo. Rep. 50, *Young vs. Kelly*.

McBRIDE, J., delivered the opinion of the court.

The county court of Callaway county commenced their action of debt against Craig before a justice of the peace on the 22nd March 1845, on a bond for the sum of seventy-five dollars, executed by John H. Cook, Nat Craig, and Daniel Nolly, payable to the county court, and bearing date the 24th February, 1834, drawing ten per cent. interest per annum from the date until paid. On the bond credits were endorsed for the accruing interest up to the 24th February 1839. Craig relied for his defence on the statute of limitations. Judgment was rendered by the justice in favor of the defendant, from which the plaintiff appealed to the circuit court, where judgment being again given for the defendant, the county court appealed to this court.

On the trial in the circuit court, the defendant introduced Daniel Nolly, a co-obligor, as a witness, to prove that Cook was the principal in the bond, and that they were sureties, and also to prove that the payments of interest endorsed on the bond were made by Cook, the principal. The plaintiffs objected to the competency of Nolly for such purpose, but the circuit court overruled their objection, and permitted Nolly to testify, to which opinion of the circuit court the plaintiffs excepted.

There were other questions raised in the circuit court, and assigned for error in this court, which may ultimately be more important in the final determination of this case, but which it is not now necessary to examine.

To sustain the action of the circuit court in admitting the evidence of Nolly, we are referred to the 26th section of the seventh article of an act to regulate practice at law, R. C. 1845, page 833, where it is provided that, "if any witness shall be objected to as incompetent, on the ground that the verdict, or judgment in the action on which it shall

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be proposed to examine him, would be admissible in evidence for or against him, such witness shall nevertheless be examined; but in that case a verdict or judgment in that action, in favor of the party on whose behalf he shall have been examined, shall not be admissible in evidence for him, or any one claiming under him, nor shall a verdict or judgment against the party, on whose behalf he shall have been examined, be admissible in evidence against him, or any one claiming under him."

If Nolly was a competent witness, his competency arises under the foregoing section. Not being a party to the suit, and his interest being adverse to that of the county court, the county court might have used him as a witness, had they seen proper to have done so; but they have not called upon him to testify, whilst Craig, a co-obligor, claims the benefit of his testimony. His interest is identified with Craig's, and adverse to the county court; where then the necessity of protecting him for testifying in behalf of Craig? There would appear to be more propriety in calling to his protection the provisions of the foregoing statute, had the county court desired to use his evidence against his own interest, and it may have been the intention of the above provision to shield those who are thus compelled to give evidence, and not to render competent a witness who is directly interested, and whose testimony is sought to defeat the liability of a joint obligor. Nolly's liability to Craig is not dependent upon the judgment which may be rendered in this case, but upon his original undertaking after the payment of the debt by Craig, whether enforced by judgment or voluntarily made.

We are therefore of opinion that the circuit court committed error in admitting the evidence of Daniel Nolly on behalf of the defendant, for the purposes for which it was admitted. The other Judges concurring herein, the judgment of the circuit court is reversed, and the cause remanded to the circuit court for a new trial to be there had.

NAPTON, Judge.

This was an action by the county against Craig, on a note, in which one Cook was principal, and said Craig and one Nolly were sureties. The defence was the statute of limitations. It was proved that Cook, the principal, had repeatedly acknowledged the existence of the debt, and had paid interest on the note, after it was barred by the statute. Whether Nolly was a competent witness is, in my opinion, of no conse-

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quence, inasmuch as his evidence was nowise material, and the proof of Cook's acknowledgments was alone sufficient to take the case out of the statute. Whatever diversity of opinion may have prevailed in relation to the sufficiency of the acknowledgment of one partner, made after the dissolution of the partnership, to revive the liability of the other partners, it is not disputed but that the acknowledgment or part payment of one of several promisors, will prevent the running of the statute as to all.

The judgment of the circuit court should therefore be reversed.

SWAN & HINKSTON, ADME'S., &C., VS HYDE & JOHNSON.

Where there is *no evidence* against a defendant, the finding of the circuit court against him *will be set aside.*

APPEAL from Washington Circuit Court.

McBRIDE, J., delivered the opinion of the court.

The administrator of Swan sued Hyde & Johnson before a justice of the peace in Washington county, when Hyde filed an off-set. The cause was submitted to a jury, who not being able to agree, were discharged, whereupon the parties agreed to submit the case to the justice, who found for the plaintiffs, and entered judgment. The defendant, Hyde, then appealed to the circuit court of Washington county, when, the cause coming on for trial, it was submitted to the judge of the court, who found for the defendant, and entered judgment in accordance with his finding; thereupon the plaintiffs filed their motion for a new trial, assigning the usual reasons, which being overruled, they appealed to this court.

The circuit court was not called upon to decide any principle of law, but tried the cause exclusively on the evidence, which was sufficiently indefinite to embarrass a jury, and prevent its decision by them on the first trial. We are not prepared to say, whether the finding of the circuit court be correct or otherwise, inasmuch as there is a conflict of testimony, and we have not the advantage of knowing the witnesses, or seeing the manner of their testifying.

But there is a total absence of proof, implicating in any wise, Mary

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Swan, the administratrix, in the subject matter in controversy, between Hinkston and Hyde. The responsibility of Hinkston, does not necessarily attach to her, and as she is not coupled with him by the evidence, it was error in the circuit court to have entered judgment against her.

The other Judges concurring, the judgment of the circuit court will be reversed, and the cause remanded.

JOHN BARR, ASSIGNEE OF W. T. BARR, vs. WILLIS J. BAKER & MARTIN BAKER.

1. Part failure of consideration, may be pleaded as a defence to an action on a note.
2. If an article be of no value for the purpose for which it was purchased, it will amount to a total failure of consideration.

ERROR to Scotland Circuit Court.

McBRIDE, J., delivered the opinion of the Court.

This was an action by petition in debt, brought by Barr, against the Bakers, in the Scotland circuit court, on a promissory note, payable two years after date, for the sum of four hundred and twenty dollars, and dated the 10th October, 1840.

The defendants filed two pleas; first, that the note was obtained by fraud, covin and misrepresentation; second, that the consideration of said note had failed. The plaintiff filed his replications to the pleas, and issue having been joined, the cause was submitted to a jury, who found for the defendants; whereupon the court entered judgment for the defendants. The plaintiff moved the court to set aside the verdict, and grant him a new trial, which having been overruled, he excepted to the opinion of the court, and has brought the case to this court by a writ of error.

The bill of exceptions shows that after the note sued on had been read in evidence by plaintiff, the defendants introduced as a witness Mr. Hannas, who testified, that on the first morning of the present term of this court, he had a conversation with the plaintiff, who said that he wished to have the trial over, in order that he might go back on Dr. Million. He did not know what was the consideration of the note, nor had he ever heard the plaintiff say what was the consideration; that in the conversation, the plaintiff spoke of a jackass, in connection with

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the suit, but what connection there was between the suit and the jack, the plaintiff did not say, nor does the witness know, except that from the conversation with the plaintiff, he understood that the suit was about a jack : that Willis Baker, one of the defendants, had a jack which he kept in the spring of 1843, and 25 or 30 mares were put to him, and that he knew of only six colts from that season ; he personally knew of but 10 mares being put, but understood there were 25 or 30. The jack was a fine looking animal, but he did not consider him worth any thing as a foal getter.

Cross-examined. Said he told plaintiff that he was a witness in the jack case, who replied that he wished the case was over, because if he could not recover of defendants, he would go back upon Million.

Sublett testified that he had kept the jack belonging to Willis Baker, the spring of 1842, when six mares only were put to him, and no colts were produced; he had been accustomed to the keeping of horses, and the jack was well kept; that he knew the jack when Million owned him. Witness went with defendants to the plaintiff to return the jack, after the commencement of this suit; plaintiff refused to take him back and give up the note, because his son William sold defendant the jack, and that he, plaintiff, had nothing to do with it; that William T. Barr, the assignor of the note, resided in Marion county, and the defendants in Scotland. He further stated that when he had the jack in 1842, he had taken him on a conditional purchase, and was to give \$200 for him, provided he was a good foal getter; that the jack would have been worth about \$200, if he had proven a good foal getter; but after he kept him the season, and found he got no foals, he did not consider him worth any thing, and would not have given three bits for him, and so he returned him to the defendant.

Alread testified, that he had known Willis Baker's jack two or three years; put two mares to him the season of 1843, and got one colt; he understood that 25 or 30 mares were put to the jack that season, and he only knew of six foals; that a good foal getter would get the greater part of the mares put to him with foal, but this jack he did not think worth any thing as a foal getter.

Howerton testified, that he had known the jack of Baker three seasons; the season he stood at Edina was 1841; the season of 1842, Sublett had him, and the season of 1843, he was kept at home; many mares were put him, and but few foals; he put him to several mares himself, and had seen the books kept by Baker in 1843, and that there were 25 or 30 mares entered in the books; that the jack was well kept and in good order; that he considered the jack worth nothing as a foal getter;

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that a jack is valuable only for breeding; that his breeding was not worth the expense of keeping him, as he was of no value.

E. Bryant testified substantially the same as Howerton.

E. G. Pratt testified, that in 1840, he knew a jack at that time owned by William T. Barr, and which was then in Marion county; that he saw the jack in the stable, but does not know of his having been let to any mares; he had heard it rumored that Barr sold him for \$500 to Baker, but did not know of the sale himself.

Swan testified that he had seen the jack; he is a small one; put two mares to him, had one colt, thinks the jack worth something; does not think him worth much as a foal getter.

The plaintiff then introduced S. Bradshaw, who testified that he knew the jack of Baker's, when he belonged to Million, 6 or 7 years ago; that the jack got three colts; that he did not know how many mares the jack went to; that he had supposed the jack was as good a foal getter as jacks generally are; that the certainty of foal-getting by jacks, generally depends very much upon the manner of keeping them; that it is not sufficient merely to keep a jack in good order, but he must also be managed to correspond with their peculiar nature; that if a jack is kept up in the stable too much he will not be so sure a foal-getter as if he had more room to play about in; whilst Million had the jack, Mr. McCracken put one mare two successive years, and had a colt from each season.

Glover testified that his father put 3, 4 or 5 mares to Dr. Million's jack, and had but one foal; he had put about the same number of mares to another jack, and had but two colts.

The plaintiff then moved the court to instruct the jury as follows :

That if they believe from the evidence that the defendant purchased the jack, without taking a warranty, and there was no fraud in the sale, the purchaser buys at his own peril, and they should find for the plaintiff.

Which was refused, and the plaintiff excepted.

The defendants then moved the court to instruct the jury as follows :

1. If they shall believe from the evidence in the cause that the note sued on was given by the defendants, Baker & Baker, for the price of a jackass sold to the defendants by William T. Barr, the assignor of the note, and that said jack, at the time of said sale, was wholly valueless, they should find for the defendants.

2. That if they shall believe from the evidence, that William T. Barr, at the time of the sale of said jack, knew that said jack was defective as a foal getter, and was wholly valueless; and that said Barr conceal-

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ed from the defendants these facts at the time of the sale, this is such a fraud upon the defendants as ought to defeat the plaintiff's action.

3. That if they shall believe from the evidence that William T. Barr stood said jack one season, that is a circumstance from which the jury may infer said Barr's knowledge of the qualities of said jack.

4. That if W. T. Barr, at the time of the sale, knew that said jack was so deficient as a foal getter, as to be valueless from some secret cause not perceptible to a person of ordinary vigilance and prudence, that good faith required Barr to disclose these defects to the defendants before the sale.

5. That if they shall believe that the jack sold was wholly valueless, no return or offer to return the jack was necessary in order to entitle the defendants to avail themselves of the defence or failure of consideration.

Which were given by the court, and the plaintiff excepted.

The plaintiff then asked the court to instruct the jury as follows :

1. If the jury believe from the evidence that the jack was the consideration of the note, and was worth any thing, and that the defendant has failed to give notice of his defects in a reasonable time to the plaintiff, or to return the same, then he is presumed to have acquiesced in the defect, and is not entitled to any deduction from the amount of the note.

2. If the jury believe from the evidence that there was no fraud used by the plaintiff to effect the sale, no deduction should be made from the amount of the note, because the jack was not a sure foal getter, unless the defendants gave the plaintiff, in a reasonable time, notice of the defect or offered to return him.

3. That if the defendant purchased the jack in dispute, on his own judgment, and without fraudulent and false representations from plaintiff, then the jury should find for plaintiff, unless the defendants gave notice of the defects or offered to return him.

4. If the jury believe from the evidence in the cause, that the defendant, Baker, had an opportunity to examine the jack before he bought him, and did not require a warranty, that he is without redress unless he can show a fraudulent concealment or misrepresentation.

Which were given by the court, and the defendants excepted.

It is assigned for error that the first instruction asked for by the plaintiff, and refused by the court, should have been given. That instruction asserts the broad principle that in the sale of a chattel, made without fraud or warranty, the vendee purchases at his peril. This is abstractly true, as is abundantly shown by the authorities referred to in

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the plaintiff's brief, and as we think is fully recognized by the court in several of the instructions given to the jury. The defendants rely upon two grounds to defeat the plaintiff's recovery; *first*, fraud in the sale of the jack, and *second*, a failure of the consideration for which the note was given.

The second and fourth instructions given at the instance of the defendants, and the second, third and fourth instructions, given at the instance of the plaintiff, refer to the defence under the plea of fraud, and present fully to the jury that question, and in a manner more easy of application than in the instructions refused by the court. Fraud is a generic term, and embraces all of the multifarious means which human ingenuity can devise, and are resorted to by one individual to get an undue advantage over another, by the *suggestio falsi*, or the *suppressio veri*. Prof. Tucker, in his notes, says "fraud is infinite; judges could not, if they would, lay down as a general proposition what constitutes fraud, or establish any invariable rule which should define it. And even if they could distinctly mark out how far courts of equity would go in relieving against it, or define strictly the species of evidence of it, the jurisdiction would be cramped and perpetually eluded by new schemes which the fertility of man's invention would contrive. All surprise, trick, cunning, dissembling, and any unfair way by which another is cheated is fraud; the only boundaries defining it are those which limit also human knavery and human ingenuity." Such being the character of fraud, the instruction refused could not have aided the jury much in forming their verdict.

The second ground of defence, to-wit: the failure of the consideration of the note, was properly placed before the jury by the other instructions given. It has long been a mooted question, how far, or to what extent there must have been a failure of consideration, to enable a party to set it up in an action at law. But it may now be considered as settled in this State, that part failure of consideration may be pleaded to an action at law on a note. See 6 Mo. R. 415, Ferguson vs. Huston and 7 Mo. R. 509, Wade vs. Scott. If the article which forms the consideration of the note be worthless, *for the purpose for which it was purchased*, the consideration has wholly failed, although it may be of some value for another purpose. How far the evidence established this fact, was a question exclusively for the consideration of the jury—there was evidence conducing to show that the jack, as a foal-getter, was of no value, and that it was for his qualities as such that the defendants were induced, no doubt, to give the extravagant sum of \$420 for him.

The other Judges concurring herein, the judgment of the circuit court is affirmed.

Hobbs vs. The State.

HOBBS vs. THE STATE.

1. Under the act of 1835, an indictment for passing counterfeit bank notes, may describe the notes as "forged and counterfeited," those words being synonymous.
2. A bank note as follows, "The President, Directors and Company of, &c., will pay, &c.," signed by the President and Cashier, is properly described as a promissory note.
3. Under that statute it is not necessary to aver that the bank had any legal existence.

ERROR to Pike Circuit Court.

CARTY WELLS, for Plaintiff in error,

Makes the following

POINTS.

1. The counts are double and repugnant, in charging the notes passed to be both forged and counterfeited.
2. They are repugnant in describing different notes from those set out in the indictment.
3. They are repugnant in describing them as promissory notes, when those set out are not notes but drafts.
4. They are repugnant in describing the notes as having been issued by the "Northern Bank of Kentucky," when those set out appear to have been issued by "The President, Directors, &c.," of said bank.
5. The counts are all defective in not averring that the corporation, issuing the notes, existed when the notes were issued or passed.
6. It is not alleged that said corporations ever had a legal existence—accepted the charter—ever issued such notes, or had power to do so.

STRINGFELLOW, for the State of Missouri.

To sustain the judgment of the circuit court the State insists:

1. That the indictment charges the offence in the words of the statute. R. C. 1835, art. 4, section 21, page 187.
2. The words "forged" and "counterfeited," as used in the statute are synonymous. Chit. crim. law 2 vol.
3. The instrument is properly described as a promissory note.
4. No venue is necessary to matters of mere description; nor is it

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necessary in this indictment to lay venue to the act of forgery or counterfeiting. Chitt. crim. law 1 vol. p. 199. In an indictment for receiving stolen goods, not necessary to lay venue to the stealing.

It is not necessary under the 21st sec., to allege that the notes were passed for any consideration.

McBRIDE, J., delivered the opinion of the court.

Hobbs was indicted by the grand jury of Pike county, for passing counterfeit bank bills, and found guilty. The indictment contains nine counts. The first count charges, "that James B. Hobbs, on, &c., at, &c., a certain forged and counterfeit ten dollar promissory note, purporting to be made and issued by the Northern Bank of Kentucky, incorporated under the laws of the State of Kentucky, which said forged and counterfeited note is as follows, that is to say :

No. 785, A.

10

No. 785. A.

10

The President, Directors and Company of the Northern Bank of Kentucky, will pay on demand to W. Coles, or bearer, at Richmond, ten dollars.

Lexington, July 20, 1842.

M. T. SCOTT, Cash'r.

JNO. TILFORD, Pres't.

Then and there feloniously did pass, utter and publish as true, to one Joseph Pugh, with the intent then and there, him, the said Pugh, to defraud, he, the said James B. Hobb's, at the time he so passed, uttered and published said forged and counterfeited promissory note, then and there well knowing the same to be forged and counterfeited contrary," &c.

The second count is like the first, with the exception that it charges that the defendant did "pass," as true, &c.

The third count charges that the defendant did "utter and publish" as true, &c.

The fourth count alleges the forged and counterfeited promissory note to have been "issued by the president, directors and company of the Northern bank of, &c., and that the defendant did pass, utter, and publish as true," &c.

The other counts charge the passing, &c., of promissory notes on the State bank of Indiana, and are framed similarly to those heretofore referred to.

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After the finding of the jury, the defendant filed his motion in arrest of judgment, which being overruled, he has brought the case to this court by writ of error.

The errors assigned are :

1. The counts are double, and repugnant in charging the notes passed to be both forged and counterfeited.
2. They are repugnant in describing different notes from those set out in the indictment.
3. They are repugnant in describing them as promissory notes, when those set out are not notes but drafts.
4. They are repugnant in describing the notes as having been issued by the Northern bank of Kentucky, when those set out appear to have been issued by the president, directors and company of said bank.
5. The counts are all defective in not averring that the corporations issuing the notes existed when the notes were issued or passed.
6. It is not alleged that said corporation ever had a legal existence—accepted its charter—ever issued such notes, or had power to do so.

The answer to the first objection is, that the indictment pursues the language of the statute. See R. C. 1835, p. 187, §21. "Every person who, with intent to defraud, shall pass, utter or publish, or attempt to pass, utter or publish, as true, any forged, counterfeited, or falsely altered instrument, or writing," &c. The words "forged" and "counterfeited," as used in the statute, are synonymous, and when used in the same connexion in all the statutes and forms, where they occur, are so used and regarded, although there is a shade of difference in their signification. See the form of an indictment at common law for forging a *feri facias*, Arch. C. P. 306. In Barbour's C. T. 117, it is said, "by a decision of the supreme court of this State, (N. Y.) made since the passage of the Revised Statute, it is settled that in an indictment for forging a check on a bank, it is sufficient to allege that the prisoner falsely made, forged and counterfeited a certain check, with intention to defraud," &c. In 8 Mass. R. 63, *Brown vs. the Commonwealth*, the indictment charged the defendant with possessing, with the unlawful intention which constitutes the offence, "twenty false, forged and counterfeit bank bills or promissory notes, purporting," &c. In the case of the *Commonwealth vs. Houghton*, ib. 107, the defendant was indicted for, "that at, &c., on, &c., he had in his custody and possession more than, viz: twenty-five false, forged and counterfeit bank bills or promissory notes, payable, &c., and no question was raised on the use of the terms "forged" and "counterfeit." From the foregoing cases, and others to

which reference has been had, we conclude that there is no substantial objection to the indictment on this point.

The second and third points embrace, as we suppose, the same objection, the third being only intended as explanatory of the second. Are the instruments set out in the indictment, notes or drafts? Webster defines a draft to be "an order from one man to another directing the payment of money—a bill of exchange." A note, "a written or printed paper, acknowledging a debt, and promising payment." Kent in his commentaries, 3 vol. 74, says, "a bill of exchange is a written order or request, and a promissory note a written promise by one person to another, for the payment of money, absolutely, and at all events." To illustrate the office of a bill of exchange, or draft, he says, if A, living in New York, wishes to receive \$1000, which awaits his order in the hands of B, in London, he applies to C, going from New York to London, to pay him \$1000, and take his draft on B, for that sum, payable at sight. This is an accommodation to all parties. A receives his debt by transferring it to C, who carries his money across the Atlantic, in the shape of a bill of exchange, without any danger or risk in the transportation, and on his arrival at London, he presents the bill to B, and is paid." Bills and notes are in two different forms, being sometimes made payable to such a man or his order, or to the order of such a man; sometimes to such a man and bearer, or simply to bearer. The bank bill or note, set out in the indictment, is a direct and unconditional promise that, "the president, directors and company of the Northern bank of Kentucky, will pay on demand to W. Coles, or bearer, at Richmond, ten dollars," and is evidenced by the signature of the agents of the corporation, the president and cashier thereof. It does not resemble a draft or bill of exchange, which is drawn by one person on another, and payable to a third, and which must be duly presented for payment, otherwise the holder loses his recourse on the drawer. This point was made in the case of the commonwealth vs. Casey, 2 Pick. R. 49, when Parker, C. J., in delivering the opinion of the court said, "it is objected in arrest of judgment, that the indictment does not allege the note to be a bank bill. But we consider it to have been expressly decided, that the note of a bank is a promissory note, as much as the note of an individual;" and reference is made to 8 Mass. R. 64, 3 Chitty's crim. law, (2 ed.) p. 947, 948, 1048, 1049.

The fourth point, which is, that the counts are repugnant in describing the notes as having been issued by the Northern bank of Kentucky, when those set out appear to have been issued by "the president, directors and company of said bank," is answered by reference to the fourth

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in the indictment, which charges that the forged and counterfeit ten dollars promissory note, purports to be made and issued by the president, directors and company of the Northern bank of Kentucky, incorporated, &c. So that if there be any weight in the objection, it is satisfied by the allegation in this count, which only differs in this one particular, from the preceding counts in the indictment.

The fifth and sixth counts raise the question whether it was necessary to allege in the indictment, the actual or legal existence of the corporation—the acceptance of its charter—that it had authority to issue, and did actually issue notes similar to the one set out.

We are of opinion that it is not necessary, further than the description is concerned. By reference to the 8th section of the R. C. 1835, p. 185, it will be seen that if the promissory note charged to be forged, &c., *purports* to have been issued by any bank incorporated under the laws of the U. S., this State, or any other State, territory, government, or country, it is sufficient so to describe it, without regard to the fact whether such bank really ever had a legal existence or power to emit notes similar to the one described in the indictment. In the case in 2 Pick. R. 49, heretofore referred to, and which was an indictment for passing a forged bank bill, the judge remarks, “it is also said, that there should have been an allegation that the bank was duly incorporated; but that was not necessary, as the indictment states a design to defraud an individual.” The bill set out in that case purported to have been issued by the merchants’ bank of Providence, R. I.

We are therefore of opinion that the indictment is good, and that the circuit court committed no error in overruling the motion in arrest of judgment. The other members of the court concurring herein, the judgment of the circuit court is affirmed.

 FRISSELL vs. J. H. & A. C. RELFE.

In an action for malicious prosecution, malice must be shewn.

APPEAL from St. Francois Circuit Court.

COLE, for Appellant.

LEONARD & BAY, for Appellees.

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1. The instructions of the court contain a correct exposition of the law governing the case. In order to maintain an action for a malicious prosecution, it is necessary for the plaintiff to show, 1st, that the prosecution was instituted from *malicious motives*; and, 2nd, that there was no *probable cause* for instituting the prosecution. If either of these be wanting, the action must fail. *Stone v. Crocker*, 24 Pick. 81; 2 Stark on Ev. 494-5; *George v. Radford*, 3 C. & P. 464; *Gibson vs. Chaters*, 2 B. & P. 129; *Silversides v. Bowley*, 1 Moore, 92; *Farmer v. Darling*, 4 Burr, 1971.

2. The malice of the defendant may be inferred from the want of probable cause. Evidence of want of probable cause is given for the purpose of showing the malicious motives of the defendant. Malice is therefore of the *gist* of the action. *Stone v. Crocker*, 24 Pick. 81; *Pangburn v. Bull*, 1 Wendell, 352; 2 Stark. on Ev. 495-6.

3. The facts preserved show that the charge of malice is unfounded. As to the "combination and conspiracy" charged, they existed only in the imagination of the plaintiff. There never was a charge so entirely disproved as this charge of a combination and conspiracy, on the part of the defendants which is made the sole ground of the action.

4. The instructions given in relation to the powers and duties of a marshal of the United States, were not perhaps necessary, nevertheless they are correct.

NAPTON, J., delivered the opinion of the court.

This was an action for a malicious prosecution brought by Frissell against Jas. H. & A. C. Relfe, and A. L. Mageniz, in the circuit court of Washington county, and transferred upon application of the Relfes, to St. Francois county. The defendants had a verdict and judgment.

Before the trial a *nol. pros.* was entered as to Mageniz. The declaration charged a conspiracy and combination on the part of Mageniz and the Relfes, to injure the plaintiff, by causing him to be fined and imprisoned, &c., and that by corrupt and false swearing of the said A. C. Relfe, a rule had been entered by the circuit court of the United States against the said plaintiff to show cause why an attachment should not issue; that these proceedings were groundless, without probable cause, and malicious.

Upon the trial it appeared that a *venditioni exponas* had been issued, directed to the marshal of the district of Missouri, commanding the sale of certain property which had been previously levied on under a

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writ of execution against one Augustus Jones. This writ of *venditioni exponas* was placed by the marshal in the hands of his deputy, A. C. Relfe, and upon the return of the writ, an affidavit was made by A. C. Relfe, that he was prevented from executing it, by the conduct of Frissell (the plaintiff) and others. Upon motion of the district attorney, A. L. Magenis, a rule was served upon Frissell to show cause why an attachment should not issue. Upon the appearance of Frissell, and his answer to this rule, he was discharged by the court.

The deposition of A. L. Magenis stated that he was attorney for the plaintiff in the case of Timothy Bryan, ex'r of Guy Bryan vs. Augustus Jones, and being of opinion that it was to the interest of his client that the goods levied on under the execution issued in this case, should be brought up to St. Louis and sold there, requested Relfe, the marshal, to have them so removed; that he afterwards requested the deputy marshal, A. C. Relfe, to make a statement of what took place, when he attempted to remove the property from Potosi; that this affidavit of A. C. Relfe was accordingly made, and he presented it to the circuit court of the United States, as ground for a rule against said Frissell and others; that deponent, as district attorney, considered it his duty upon the facts disclosed by said affidavit, to apply for said rule, and that the application was made, not upon the request or at the instance of either J. H. or A. C. Relfe, but upon his own motion, &c.

There was evidence on the part of the plaintiff, the object of which was to show that the affidavits of A. C. R. was false; that there had in fact been no resistance to the officer, made by Frissell.

The court instructed the jury, that to sustain the action, the proceedings in the United States circuit court must be shown to have been commenced, or procured to be commenced, by the defendants; that malice, or such circumstances or conduct as clearly indicate malice, is essential to the action, as well as that there was no color or probable cause to institute the proceedings complained of. A variety of instructions were also given, in relation to the duties and powers of the marshal, but their propriety not being questioned, and their bearing upon the merits of the case being but remote, it is not deemed necessary to insert them.

The principal ground taken for the reversal of the judgment, is because the verdict is unsupported by the testimony. Want of probable cause, it is laid down in the books, is a question of law to be determined by the court, upon the facts in evidence, but it has been usual in this State to leave this, as well as the question of malice, to be determined by the jury. The instructions in this case being without excep-

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tion, there is sufficient in the testimony of Magenis, without reference to the other facts in the case, from which the jury may have been satisfied that the prosecution was not instigated by the defendants, or either of them.

The judgment of the circuit court is therefore affirmed.

JENNINGS vs. THE STATE.

1. An indictment under the 35th sec. 2. art. of an act concerning Crimes and Punishments. R. C. 1835, should state the *circumstances* attending the commission of the offence.
2. It is sufficient to state them thus, "that on, &c., at, &c., with force and arms, did feloniously make an assault on the body of one G. with a large iron auger, and then and there did feloniously wound, disfigure, and inflict on the body of said G. with the said augur, great harm." The words in the act, "in a case and under circumstances," &c., may be rejected as surplusage.

APPEAL from Benton Circuit Court.

STRINGFELLOW, Attorney General, for Appellee.

To sustain the decision of the circuit court, insists :

1. 'That the evidence objected to, ought to have been admitted, as it was a continued transaction.
2. The instructions asked by defendant, ought to have been rejected; the first being too general, and the others restricting the issue.
3. The instructions of the court were properly given.
4. The indictment is sufficient. *Johnson vs. State*, 7 Mo. R. 183; Stat. '35, Cr. & Pun.

NAPTON, J., delivered the opinion of the court.

The appellant was indicted in the circuit court of Benton county, under the 35th section of the 2nd article of the act concerning crimes and punishments. The indictment charged that the defendant on, &c., at, &c., with force and arms, did feloniously make an assault on the body of one Samuel Grosong, with a large iron auger, and then and there did feloniously wound, disfigure and inflict on the body of said Samuel Grosong, with the said iron auger, great harm, under circumstances which would have constituted manslaughter, if death had ensued, contrary," &c.

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The defendant was found guilty, and sentenced to an imprisonment of thirty days in the county jail, and to pay a fine of fifty dollars. A motion was made in arrest of judgment, and for a new trial, both of which were overruled.

On the trial, the court instructed the jury, that if the defendant wounded Grosong, or did him great bodily harm, with auger, and the auger was a dangerous weapon, or calculated to produce death, he was liable to the prosecution, and in that case, the amount of injury was not important; but if the weapon was not a dangerous one, the defendant was not guilty, unless the wounds were of a dangerous character, from which death might probably have ensued.

The proof on the trial was that the defendant had inflicted the wounds with an auger.

The principal point we suppose to be relied on for the reversal of this judgment, is the alleged insufficiency of the indictment. The indictment is very inartificially drawn, but rejecting from it such words as are mere surplusage, and transposing its language, it will be found to embrace every substantial requisite of a charge under the 35th section of the 2nd article of the act. It will then read, "that the defendant, at &c., on, &c., with force and arms, did feloniously make an assault on the body of one Samuel Grosong, with a large iron auger, and then and there did feloniously wound, disfigure and inflict great bodily harm on, said Samuel Grosong, contrary, &c." There is no material difference perceived between the expression "did wound, disfigure and inflict on the body of said Samuel Grosong, great harm," and the transposition of the language which we have suggested. There is no doubt that the language used in the indictment—"under circumstances which would have constituted manslaughter," &c.—may be rejected as surplusage, and that it is essential in an indictment under the 35th sec. to aver the circumstances themselves, which if death had ensued, would have made the offence manslaughter. This, we think, is sufficiently done in the averment that, the assault was made feloniously, and with an auger—a dangerous weapon. To the instructions we can perceive no serious objections, and the judgment will therefore be affirmed, Judge McBRIDE concurring.

SCOTT, J., dissenting.

Haden vs. Herndon, adm'r.

HADEN vs. HERNDON, ADM'R.

1. Where the circuit court has ordered the defendant to file a bill of particulars of a set off of which the defendant has given notice, upon failure to comply with the order, it is competent for the circuit court to exclude all evidence of a set off.
2. Evidence that defendant had given witness a draft on plaintiff, and that plaintiff had promised to pay it when presented, requested time, and did not pay the draft, and that at same time plaintiff said he was indebted to defendant five or six hundred dollars, and that their business was unsettled, is competent under the plea of non-assumpsit.

APPEAL from Howard Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was an action of assumpsit brought by Herndon, administrator of Chrisman, against Haden, to recover the value of merchandize sold to the defendant by Chrisman. The plea was non-assumpsit, and a notice of set-off. Issue was taken on the plea of non-assumpsit, and the cause continued. At the next term the cause was again continued at the instance of the defendant. At that term, upon motion of the plaintiff, the court ordered the defendant to furnish the plaintiff with a bill of particulars of his set-off, on or before the ensuing term. This the defendant failed to do. On the trial, the account of the plaintiff's intestate was produced, and consisted of various items of merchandise procured by defendant during several years, commencing in 1835, and ending in the year 1840, it was admitted to be correct, and the defendant, to sustain his set-off, offered to read the deposition of A. W. Maupin.

This deposition stated, that in the fall of 1838, or spring of 1839, the witness, being about to make a journey to Fayette, where Chrisman, (the intestate,) resided, the defendant proposed sending by him an order on said Chrisman for \$200, which he accordingly acceded to, for his own convenience as well as Haden's; that the witness called on said Chrisman and presented the order; that Chrisman desired witness to wait on him one day to enable him to raise the money; that the witness consented to this, but did not get the money; that Chrisman then stated that Haden's business and his, the said Chrisman's was yet unsettled; that there was more than the amount of the order due said Haden; that there was some five or six hundred dollars due from him to Mr. Haden, on or involved in their settlement.

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This deposition the court excluded, the defendant then offered to read it under the plea of non-assumpsit, but upon objections being made, this was not permitted. The plaintiff had a verdict. Motion for a new trial was made and overruled, and the case is brought to this court by appeal.

No serious objections have been urged, nor any perceived, to the course of the circuit court, in directing a bill of particulars of defendant's set-off, and upon his failure or refusal to furnish it, in excluding all evidence of a set-off. But we cannot say, that the deposition of A. W. Maupin was incompetent under the plea of non-assumpsit. Its direct and principal tendency was doubtless to prove a set-off, but it might lead remotely to a presumption of payment. However slight this evidence may be, we think it not irrelevant, and the judgment will therefore be reversed, and the cause remanded.

SANDFORD vs. JUSTICE.

Where a party sold an improvement on the public land, representing himself as entitled to a pre-emption on the land, although it appear that the vendor had no pre-emption, the vendee cannot recover as for a failure of consideration or fraud, unless it appear that the vendor was guilty of a fraud, or that the vendee has sustained some loss.

APPEAL from Greene Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was an action of trespass on the case brought by Justice against Sandford, to recover damages for fraudulent and false representations made by said Sandford in the sale of an improvement to said Justice. The declaration contains eight counts; the first seven counts allege that Sandford falsely and fraudulently sold an improvement to Justice, upon which he represented that there was a pre-emption right, and that there was no pre-emption right on the land. The eighth is a count in trover.

Upon the trial, it was proved that Sandford sold Justice his improvements upon a quarter section of land, for a wagon, a horse, and Justice's note for sixty dollars. The witnesses differed as to the representations made by Sandford; two of them testifying that Sandford represented that he had a pre-emption upon the land which would hold

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good until the 1st May, 1844, and the other witnesses not recollecting that anything was said on this subject. Justice was living on the land at the time of the trial, which was in May, 1845, and had been living on the same since his purchase from defendant. He had been using the timber for his own use, and also had hauled from 25 to 28 cords to others.

Joel H. Haden testified that there was no pre-emption on the land, at the time of the sale to Justice, nor at the time of the trial, and that it must be set up at public sale, though he at one time believed that the land was subject to pre-emption.

The court instructed the jury: first, that if Sandford sold a pre-emption to Justice, when he had none, the plaintiff was entitled to recover; and secondly, if they believed if Sandford had obtained Justice's property by fraud or without consideration, the plaintiff must recover. The court further instructed the jury, at the defendant's instance, that if Sandford sold his improvements, and not a pre-emption, they must find for defendant.

The plaintiff obtained a verdict and judgment for the full value of the property which the defendant had got in consideration of his improvement or pre-emption, and the defendant brings the case here by appeal.

We think the first instruction is erroneous, and may have misled the jury. A settler on the public lands, as this court has heretofore held, may sell his improvement, and such a contract is not a contract touching any interest in land, and therefore need not be in writing. A man may renounce his possession and such abandonment in favor of another is a sufficient consideration to support the contract growing out of such renunciation or abandonment. If he represents that the land thus abandoned is subject to a pre-emption right, and such a representation is a fraudulent and false one, he is clearly entitled to derive no benefit from his sale, and the opinion of the circuit court on this branch of the case is unexceptionable. But if, in a case, unaffected by any fraudulent misrepresentation, the vendor is honestly mistaken as to his rights, before the vendee can ask a court of justice to refund to him the purchase money, it must appear that the mistake or misrepresentation has produced a partial or total failure of consideration. Shall the plaintiff in this case be permitted to retain possession of the improvements, which constituted the consideration of his bargain, and also to get back the whole of the purchase money, until it appears that he has been disturbed in his possession? It does not appear that any one has entered the land on which the plaintiff resides, or that he will not ultimately

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get all he expected to get. If this were so, or if the plaintiff was compelled to pay more than the minimum price for the land, there might be a failure of consideration.

The first instruction of the circuit court is that if the defendant sold a pre-emption, and no pre-emption existed, the plaintiff was entitled to recover. The sale of a pre-emption can only mean the sale of an improvement, accompanied with a representation of a pre-emption right existing to the improved land. The plaintiff, when he received the possession, obtained all for which he contracted, and if the representation which may have induced him to purchase, has occasioned him a loss, he is entitled to compensation for such loss. The instruction is too broad, and takes from the consideration of the jury, both the question of the *scienter*, and also the consideration of the question whether the plaintiff was damaged by the representation, supposing it to have been untrue. The judgment of the circuit court is therefore reversed, and the case remanded.

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If a person hire a slave for a year, and the slave die during the time, the hirer is bound for the hire only to the time of the death.

APPEAL from Warren Circuit Court.

CARTY WELLS, for Appellant.

The only point made by plaintiff in error is: That the court erred in giving the following instruction:

"That if the negro died during the year, without the fault of the defendant, that the plaintiff could only recover on his bond up to the time of the death."

He insists that the hiring is in the nature of a sale of the services of the slave for a year, and that defendant took him at his own risk. The contract was complete on the delivery of the slave. See *Knox vs. Blanton*, 3 Mo. Rep. 242; 6 Mo. R. 324; 8 do. 33; 5 Monroe 360.

CAMPBELL, for Appellee.

The points I make in this case are:

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1. That the death of a hired negro, before the end of the term, without the fault of the person to whom he is hired, is the act of God, and that under the law the loss must fall on the owner.

2. When a negro dies, he ceases to be property—he is no longer a slave—and it is not lawful to exact wages for services that cannot possibly be rendered.

If a free man contract to serve for a year, for a specified sum, and die before the end of a year, the payment of wages ceases from the time of his death; for the same reason the payment of the hire of a slave should cease when he dies.

NAPTON, J., delivered the opinion of the court.

This was a suit upon a note given for the hire of a negro for one year. The slave died before expiration of the year, and the question was whether there should be an abatement of the hire, from the death of the negro. The circuit court decided affirmatively on this proposition, and this court is now called upon to determine on the propriety of that decision.

Cases of this character do not derive much light from the analogies of the law on the subject of rents. If those analogies be adhered to with strictness, it is plain that the doctrine of the circuit court cannot be sustained.

In Virginia the doctrine has long been settled that the death of the slave discharges the hirer from the payment of wages, though no very good reason is given by the courts of that State for distinguishing it from the case where the slave runs away during the term, in which case they admit the loss of the term to fall upon the hirer, and the loss of the reversion to fall on the owner. *George vs. Elliott*, 2 H. & M. 6. This decision, originally made by chancellor Taylor, appears to have been adopted in South Carolina, and in North Carolina. 2 Bailey 424, Wheeler 153. A contrary doctrine prevails in Kentucky. 5 Monroe 359, 1 Bibb 536.

The doctrine maintained by the circuit court of Warren county seems to have prevailed among most of the slave holding States, and as it is a doctrine which appears most conformable to the principles of natural justice, and is not inconsistent with any settled rules of law regulating contracts, in relation to this species of property, the judgment of that court will be affirmed.

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W. & J. HILL vs. A. & A. BUFORD, Ex'rs, &c.

A, being bound as endorser for B, on a note in bank, B executed an obligation with C as security, binding themselves to "secure and keep safe the said A from all loss or damage he might sustain" on account of such endorsement. A died, and the note becoming due, E and F, his executors, renewed the note in their name, and had to pay the last note. E had the amount paid by him allowed against A's estate. It was not shewn that F had had his claim allowed.

Held, .

That E and F, as executors of A, might recover for the whole amount paid them—and the jury might infer that the payment by F was made for the estate of A.

APPEAL from Monroe Circuit Court.

TODD, for Appellants,

Seeks to reverse the judgment below for these reasons :

1. The admission of illegal, incompetent and irrelevant testimony. *First*, the deposition of Robertson, (book-keeper of the bank,) to prove the contents of his books, and the acts of the officers of the bank in discounting and renewing notes. *Second*, the admission of Abraham Buford, jr., to prove the loss of the original note, by applying to the bank for it—the same never having been in his possession. *Third*, the admission of the note due in May, 1841, without proof of an original, and *being duly executed*; and of any notes other than that in original agreement without accounting for non-production, and the execution by the parties of such notes—of Davis' judgment in the county court—as incompetent and irrelevant.

2. The first instruction, as in case of a non-suit, should have been given. *First*, there was no evidence to prove payment, by the administrators, of the note of about \$800, existing in January, 1840, or of the testator's payment—even the note is not produced as presumptive evidence of payment, nor its loss accounted for. *Second*, there is no legal evidence of the continued renewal of that original in the bank to identify the same indebtedness. No such notes are produced or proven nor their loss accounted for. *Third*, the evidence of Abraham Buford, jr., endorsing the note due in May, 1841, of an alleged balance of the indebtedness, is a new contract between him and the other makers, and the liability thereon is a legal one, in his own right, and does not enure to the administrators on the contract sued upon. *Fourth*, if by

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substitution, Abraham Buford, jr., by making and paying the last named note, became entitled to the contract with testator, it is in his own right, and his remedy is in equity, so far as he paid. *Fifth*, although Abraham Buford, jr., and Davis, paid parts of the last note of May, 1841, to the bank upon judgments, yet there is no evidence that the estate of the testator was damnified, for neither persons were paid out of the estate—for the judgment of Davis, in the county court, has not been paid, nor Abraham Buford, jr., refunded out the estate. *Sixth*, the original note existing in January, 1840, is still outstanding against the makers; the plaintiff never paid it, or their testator; it is not lost or out of the power of plaintiffs to produce if they paid it, or their intestate, they have produced no discharge of the makers.

KIRTLEY, for Appellees.

In support of the judgment of the circuit court, I rely :

1. That the action is rightfully conceived, and brought by the plaintiffs as executors of the will of Abraham Buford, deceased, and could be sustained in no other form.
2. The court rightfully admitted in evidence the notarial protest and copy of the note for \$562.
3. Drydon's and Robertson's testimony is neither hearsay nor secondary, but a detail of facts within their own knowledge, and was properly admitted.
4. There was no secondary evidence given of entries in the books of the bank of Missouri, for the reason that said books, (if they had contained entries in relation to the subject matter of this suit,) nor copies of them, would have been legal or competent evidence against these defendants. 1 Stark. 292-3, and cases referred to; 1 Ph. Ev. 422; 3 J. R. 226; Greenleaf on Ev. 589, p. 102, § 474, p. 526; 10 J. R. 445, Southwick vs. Stevens 5.
5. The record and proceedings of the Ralls circuit court, in the case of the bank for the recovery of the \$562, was properly admitted in evidence, with the parol evidence also given, it was proper to show the amount of damages, costs and expenses incurred by the executors of Abraham Buford, deceased, on account of defendants' breach of their agreement, and they could as well recover the costs and charges as damages sustained, as the debt and interest due by the note.

So likewise of the record of the allowance by the county court of Ralls, of the \$215 46, against the estate of Abraham Buford, deceased, paid by Davis on the bank debt. It was all that could have been read

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in evidence, or that relates to the subject matter of the suit, or of the allowance.

6. The admissions of Jas. Hill, of Saml. Hill's indebtedness to the bank, and his difficulty in meeting the instalments on the note, proven by Emmerson, was relevant and proper evidence.

7. The motion of defendants to the court for an instruction, directing the jury that the plaintiff could not recover, was rightfully overruled, as plaintiffs had fully proved the agreement sued on, the testator's performance, the defendant's breach of that agreement and the several sums of money paid by the executors on the bank debt, which the Hills should have discharged.

8. The other eight instructions, asked by defendant, were rightfully overruled.

NAPTON, J., delivered the opinion of the court.

The defendants in error, who were executors of the estate of Abraham Buford, deceased, sued Wesley and James Hill in assumpsit, upon a special contract, and recovered a verdict and judgment for \$375 74; which the said W. & J. Hill now seek to reverse.

The facts, as preserved by the record, appear to have been these: On the 10th June, 1840, the plaintiffs in error executed the following instrument, which is the foundation of the present suit: "Be it remembered that Abraham Buford, sr., and Samuel Hill, both of Ralls county, Missouri, is indebted to the bank of Missouri, at St. Louis for \$800, or thereabouts, amount not recollected precisely, which debt is a joint one between the parties aforesaid; and the said Samuel Hill, for the purpose of securing the said Buford from loss on account of the note aforesaid, placed in the hands of Mr. Hays a note which he held on the said Buford, for \$333 1-3; now the said Hill wishes to withdraw the said note out of the hands of the said Hays, and for that purpose we do bind ourselves to secure and keep safe the said Abraham Buford from all loss or damage he may sustain on account of the proportion of said note which the said Samuel Hill would be bound to pay—provided the said note is given up to the said Samuel Hill, which is in the hands of the said Hays. Witness our hands, &c., this &c., Wesley Hill—James Hill." The note of A. Buford, sr., in the hands of Hays, was given up in pursuance of the above agreement. It appears that the note of S. Hill and S. Davis, endorsed by Abraham Buford, sr., for one thousand dollars, was discounted by the bank at St. Louis, on the 15th January, 1839; that it was renewed from time to time until it was reduced to the

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sum of \$562, when it was forwarded to the branch bank at Palmyra, where, upon its maturity, Abraham Buford, jr., became endorser instead of A. Buford, sr., and this note matured 29th May, 1841. Two suits were instituted by the bank upon this note, one against Abraham Buford, jr., the other against Samuel Hill and Simeon Davis; and judgment obtained in both suits; \$425 was paid by A. Buford, jr., and \$204 93 was paid by Major Hays. Letters of administration had been granted on the estates of A. Buford, sr., deceased, on 20th October, 1840, to Alexander and Abraham Buford, jr., the defendants in error. The amount paid by Davis, (through Major Hays), was allowed by the county court against the estate of A. Buford, sr., deceased, \$215 46.

Objections were taken in the progress of the cause to the competency of the evidence which was introduced, and to the relevancy of a portion of it. When the plaintiffs had closed their testimony, the defendants asked the court to instruct as in case of a non-suit, but the court refused so to decide the law. The defendants then applied for several instructions, in substance declaring the law to be, that if the note mentioned in the contract sued upon, was taken up by the renewal of a note upon the credit of Abraham Buford, jr., in place of A. Buford, sr., the plaintiffs could not recover.

This was an express contract on the part of W. & J. Hill, that they would "secure and keep safe the said Abraham Buford, sr., from all loss or damage he might sustain," on account of his liability for Samuel Hill's bank debt. The contract was a written one, and founded on sufficient consideration, and the only question in this suit seems to be, whether the said A. Buford, sr., has sustained any loss or damage by reason of his said securityship, for the debt of said Hill. It appears that in 1840, Abraham Buford, sr., died, and that shortly after his death his son and executor of his will, Abraham Buford, jr., substituted a note, endorsed by himself, for the note endorsed by his father; Samuel Hill and Simeon Davis being on the second note as the makers thereof, as they had been on the first. This second note was collected by the bank, and the entire amount, paid by A. Buford, jr., and the estate of A. Buford, sr.; the amount paid by Davis had been allowed by the county court against the estate, though there was no evidence at the trial to show that the amount paid by A. Buford, jr., had been allowed in the settlement of his account as executor of the estate of his deceased father.

If Abraham Buford, jr., and Simeon Davis had been mere volunteers, and not otherwise connected with the transaction, except so far as they are seen renewing the note of Samuel Hill and Abraham Buford, sr.,

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no assumpsit would arise in their favor against the securities of S. Hill. But we think the jury were well warranted from the facts, that A. Buford, jr., was the executor of his father's estate, and that Simeon Davis was on the original note, in inferring that this substitution of the new note of A. Buford, jr., and S. Davis, for the old note of A. Buford, sr., was done for the benefit of the estate of A. Buford, sr., and at the request of the executors who managed the interests of that estate.

So far as the amount of \$215 46, which was paid by Davis, is concerned, that was allowed against the estate of A. Buford, sr., by the county court, and though no allowance was proved to have been made in the settlement of the administration account, by the executors, of the amount paid by A. Buford, jr., yet it was manifestly a payment on behalf of the estate, and therefore chargeable against the same.

The other Judges concurring, judgment affirmed.

 SMITH & BELL vs. STEPHENS.

1. As a general rule, a bailee may deliver goods deposited with him, to the bailor or his order, although they may have been sold by the bailor since his deposit.
2. Where a bailee having a lien on goods, agreed with a vendee of the bailor to deliver them to him upon payment of charges, and then refused to comply with his agreement, and delivered them to the bailor, it is evidence of a conversion.

APPEAL from Platte Circuit Court.

NAPTON, J., delivered the opinion of the court.

This was an action of trover brought by Smith to recover the value of a pair of burr mill-stones, alleged to have been converted by the defendants to their use.

The facts of the case appear to have been as follows: One Cornman deposited the mill-stones and irons appurtenant thereto, in the warehouse of one Cunningham, in the town of Weston, and Bell & Stephens, the defendants, succeeded Cunningham in the occupation of the warehouse, and in the custody of said mill-stones as warehousemen. Whilst the mill-stones were in this custody, Cornman sold them to one Whitmore, and Whitmore sold them to the plaintiff, Smith. It was the

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understanding on both sales, that Cornman was to pay the charges on said mill-stones. Shortly after the sale to the plaintiff, the plaintiff and Whitmore called on Bell, one of the defendants, to get the mill-stones, but they were told that there were charges on them, and they would retain possession until the charges were paid; upon being informed that Cornman was to pay the charges, the defendants still declined letting the mill-stones go, until their charges were paid. Bell, however, acknowledged at the time of this refusal, that he was well aware of the sale from Cornman to Whitmore, and of Whitmore to plaintiff, and that plaintiff was justly entitled to the stones. Upon another occasion, the plaintiff again applied to Bell for the stones, and upon his again refusing to let them go until the charges were paid, the plaintiff agreed to pay the charges and give an indemnifying bond, and a day was fixed when plaintiff was to pay the charges and give the bond, and the defendants were to deliver the stones. The plaintiff attended on the appointed day, but Bell had gone to Liberty; and on that night Bell returned on a boat, and delivered the mill-stones to one Utt, who took them on board the same boat Bell had left.

A witness testified that he called upon defendants, and told them at plaintiff's request, that he, plaintiff, would sue them, to which Bell, one of the defendants, replied, "he did not care a damn; he had delivered them upon Cornman's order to Utt, and that Utt had paid the charges on them, and given an indemnifying bond." This witness further stated, that the day after the one set by Smith and Bell, for the delivery of the mill-stones to Smith, Smith came in for the purpose of completing the arrangement which had been previously made between them.

Whitmore, testified, that he had bought the stones of Cornman for \$300, and sold them to Smith the plaintiff, who paid him; that he and Smith went to defendants, and stated the contract to them.

Cornman, testified, that he sold the said stones to Whitmore, and Whitmore to Smith; but subsequently to the sales aforesaid, had notified defendants not to deliver the stones to the plaintiff; and he afterwards gave Utt an order for the same, which order was given at the request of Whitmore, because said Whitmore had told witness that plaintiff had not complied with his contract.

It appeared that the charges upon the mill-stones were about sixty dollars; that the stones were delivered to Utt, he having paid said charges and given an indemnifying bond.

Upon this evidence, the court instructed the jury, that if Cornman, the bailor, forbid the delivery of the mill-stones to Smith, and ordered

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the mill-stones to be delivered to Utt, and they were so delivered, the plaintiff could not recover. The court further held the law to be, that if Cornman, when he sold the mill-stones to Whitmore, was to pay the charges for freight and storage, which the defendants had on the same, then until said Cornman paid the charges on said stones, no property in said mill stones passed to said Whitmore by said sale, and if Cornman failed to pay the charges on said mill-stones, the sale of the same by Whitmore to plaintiff, passed no title to plaintiff.

The plaintiff thereupon took a non-suit, and afterwards moved to set it aside, which motion being overruled, he excepted and brings the case here by appeal.

The only question in the case, is the propriety of the instructions given by the circuit court. The last instruction assumes the law to be, that the sales from Cornman to Whitmore, and from Whitmore to Smith, were incomplete and ineffectual, until Cornman the vendor, paid the freight and charges, it being the understanding at the time of the sale, that he was so to do. The right of Smith to rescind his contract with Whitmore, and thereby revest the title in Whitmore, and of Whitmore to take the same course in relation to his contract with Cornman, because of Cornman's non-compliance with so much of his contract as required him to pay the freight and charges on the mill-stones, is unquestionable; but as neither Smith or Whitmore has thought proper to avail himself of this privilege, it is of no consequence in the decision of the present action.

It would be hard upon a bailee of goods, if he could not honestly decline to decide between conflicting claimants of the goods bailed, without subjecting himself to an action of trover. Nor do we suppose that if the bailee delivers up the goods to the order of the bailor, he can be made liable by reason of transfers from the bailor, subsequent to the bailment. This would be the law, where there are no special circumstances to show any variation from the ordinary liability of the bailees, as wharfingers or warehousemen.

Other questions are, however, presented by the facts of this case. There was evidence to show that the defendants acknowledged the title of Smith, and agreed to deliver him the goods, provided he would pay the charges, and give an indemnifying bond. This was evidence of a conversion proper to go to a jury. If the defendants delivered the goods to Utt, contrary to their understanding with Smith, it was clearly a conversion, and made them liable. *Mills and others vs. Ball*, 2 Bor. & Pul. 457; *Judah and others v. Kemp*, 2 John. Ca. 411; *Patterson v. Robinson and others*, 2 Maule & Selwy. 105.

Coode & Jones vs. Jones.

There is a conflict of the testimony on some of the points involved, which leave the merits of the case uncertain. Cornman testified that his directions to the defendants in relation to the stones were prompted by Whitmore's declarations to him, that Smith had not complied with his bargain. Whitmore himself states that he sold to Smith, and that Smith paid him, and that he accompanied Smith to the store, of Bell & Stephens for the purpose of advising them of the transfer, and directed them to let Smith have the stones. This is a matter for the jury. The instructions given by the court were erroneous, and the case will be remanded for a new trial.

Judgment reversed.

GOODE & JONES vs. JONES.

An endorsement upon a note "I sign the within as security," if made at the time of the execution of the note, will be regarded as a part of the note, and will make the person signing the same an original promisor. But if made after the execution of the note, it will be merely a collateral undertaking, and the parties cannot be joined in an action against the maker of the note.

APPEAL from Franklin Circuit Court.

COLE, for Appellants,

Presents the following points on behalf of appellants :

1. The contracts of Jones & Goode are radically different, and could not consistently with law be joined together in the same action.
2. The bond sued upon was not the foundation of the suit against Goode, nor was the endorsement thereon the foundation of the action of debt against William T. Jones. *Brown v. Lockhart*, 1 Mo. R. 409.
3. The evidence therefore was illegal and inadmissible without proof, if then.
4. The undertaking of Goode was collateral to that of William T. Jones, and is a void contract under the statute of frauds. (Roberts on frauds, page 207;) *Wain & Watters*, 5 East, page 10; Long on personal property, page 27.
5. The contract of Goode, at common law, was a *nudum pactum*.
6. The action was debt on *bond*, the evidence admitted did not prove that allegation.

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7. The judge of the circuit court erred in deciding that the writing endorsed, was a *bond*.

JONES, for Appellee,

Insists that the circuit court committed no error.

It is not necessary for the justice to describe the instrument sued on; and if he does, it is surplusage. The defendant before the justice was summoned to answer the complaint of the plaintiff.

The endorsement by Goode imports a consideration. See R. Stat. p. 189, chap. 21. Bonds & Notes, sec. 1; also, Powell vs. Thomas, 7 Mo. Rep. 440; see Barnett, et. al. vs. Lynch, 3 vol. 261; 5 Mass. 358; 6 Mass. 519; 7 Mass. 518; 11 Mass. 436-440; Ashley vs. Watson, 9 Mo. R.

There is no sufficient bill of exceptions in this case.

NAPTON, J., delivered the opinion of the court.

This was a suit originally brought before a justice of the peace, upon the following note:

"One day after date I promise and oblige myself, my heirs, &c., to pay or cause to be paid unto Charles C. Jones, the just and full sum of one hundred and nine dollars sixty-one cents, for value received, as witness my hand and seal this twenty-second day of November, eighteen hundred and forty-three, with ten per cent. interest till paid.

WILLIAM T. JONES, [seal.]"

Upon this instrument there was the following endorsement: "I assign the within note as security to Charles C. Jones, this 4th Dec'r, 1843.

JOHN GOODE."

The plaintiff obtained a judgment both before the justice, and in the circuit court, against both Goode & Jones, for the amount of the bond with interest.

Upon the trial in the circuit court, an objection was made to the reading of the endorsement upon the bond as evidence, but the objection was overruled and exceptions taken. It seems from the instructions given, that the bond was considered by the court as the bond of both Goode & Jones; the plaintiffs in error contending that the endorsement of Goode was but a guaranty and an undertaking entirely collateral to the obligation of William T. Jones.

The case of Hunt, adm'r. vs. Adams, (5 Mo. R. 359,) (6 Mass. R.

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519,) is an authority to show, that where a party writes underneath a promissory note of another, the words, "I acknowledge myself holden as surety for the payment of the demand of the above note," and such writing is executed at the same time the note is signed by the principal, and before the delivery of the same to the payee, such acknowledgment constitutes the person making it an original party to the contract.

The note in that case was construed as in effect a joint and several promise by the principal and surety. In the case now under consideration, the obligation of William T. Jones was executed on the 22d November, and the endorsement of Goode was executed on the 4th December. Upon its face this endorsement purports to be a collateral undertaking on the part of Goode to pay the debt of W. T. Jones, if said Jones shall fail to do so. Jones and Goode could not be sued in the same action as original promisors and parties to the same contract; the liability of Goode being merely collateral, the facts must be set forth and shown which make him liable.

. The judgment is reversed and cause remanded.

REEDS vs. MORTON.

1. The provision in the act of 1825, regulating the levying, assessing and collecting the revenue, which requires the certificate of the sale of land for taxes, to be recorded, was to give to the owner of the land additional means of ascertaining that his land had been sold.
2. The court adheres to the opinion heretofore expressed in this case, "that the law regulating the sale of land for taxes, must be strictly complied with; and that the pre-requisites to authorize a deed to be made, must be shewn, or the deed will be void.
3. The act requires the certificate of sale to be recorded; it must have been done in reasonable time, or the deed will be void.
4. When the certificate was not recorded until after the time of redemption had expired, and a deed been made, will not be affected by being recorded. The deed will be void.

APPEAL from Lincoln Circuit Court.

TOMPKINS, JAMISON & WELLS, for Appellant,

Reeds vs. Morton.

Make the following**POINTS.**

1. The collector's bond ought to have been read. It tended to prove that the collector was legally in office. The only objection to it is that it was not recorded—this does not avoid the bond or nullify the acts of the collector. The law is only directory.

2. The exhibit (A) in Barcroft's deposition, ought to have been read as a part of the deposition. The testimony of Parker, the clerk, shows that the exhibit was enclosed, sealed up and directed to the clerk, in conformity with the "act concerning depositions." See Digest, p. 220, sec. 18. The deposition referred to it, as "a duly authenticated copy." It was correctly described—the marking and referring to, was a sufficient authentication.

3. The parol evidence of the witnesses to prove the setting up of notices, and their contents, ought to have been admitted. The original notices could not be had—every reasonable exertion had been used to get one. It is true that the defendant had not searched everywhere, but he had searched, and searched where it was most likely to be found. The setting up could only be proved by parol evidence.

4. The auditor's certificate and deed were competent evidence. They were the acts of a public officer, made in conformity to law, and ought to have been admitted without proof of execution. They were acknowledged and recorded, and ought to have been read under the statute. See act on conveyances, p. 123, sec. 35.

It was objected to on the ground that it did not shew title out of the plaintiff. If true, this objection is not to its competency or relevancy, but to its sufficiency. It will not do to exclude evidence because it is insufficient. The court judges of its competency—the jury of its sufficiency.

5. The notice of lands sold in 1833, tended to explain Sitton's evidence as to the year he set up notices. He stated that he set them up in 1832 or '33. The notice shows it was not in 1833—it was therefore in '32.

6. A new trial ought to have been granted, because had the court not committed the errors above mentioned in the exclusion of proper evidence, the defendant ought to have had a verdict. He had proven, *first*, the appointment of an assessor; *second*, the assessment; *third*, the correction by the county court of the assessor's list; *fourth*, the appointment of a collector; *fifth*, the non-residence of Paul Chouteau; *sixth*, the

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non-payment of the tax; *seventh*, the return of the delinquent list to the auditor; *eighth*, the advertisement of the auditor's sale, both in the newspaper, and in the county of Lincoln; *ninth*, the sale of the auditor; *tenth*, his certificate thereof and conveyance; and *eleventh*, the recording the notice of sale by the clerk of Lincoln circuit court, as also the recording the auditor's certificate and deed. All these things were shewn by the evidence to have been done in strict conformity with the statute law.

It is also insisted by plaintiff in error that the auditor's deed and certificate, that the provisions of the law had been complied with, were sufficient evidence to shew title out of the plaintiff.

1. It is admitted that to make a sale of land for taxes valid, the statute authorizing such sale must be pursued.

The main question is, how is that conformity to the statute to be proven.

2. We hold that when a public officer has acted in the discharge of an official duty, the legal presumption is, that his act is done in conformity to the law—that all pre-requisites of the act have been complied with.

3. That that legal presumption applies as well to the validity of the act done, as to his own personal indemnity and security; that the principle may be invoked as well by the person who claims under the officer, as by the officer himself.

From these premises it follows, that the sale of the auditor pre-supposes the return to him of a non-resident delinquent list, because upon the return of such list only, could he have power to sell. *Second*, that the return of such "list" pre-supposes assessment, and that the person assessed was a non-resident, because upon the existence of these facts only, was the collector authorized to return such list, &c. *Third*, that the action of the assessor as such, and the action of the collector as such, prove that they were duly appointed respectively to said offices.

We therefore conclude that the exhibition of the auditor's deed proves *prima facie* that all the pre-requisites of that sale had been complied with. But, *second*, if this be not the law of evidence, the legislature have full power to change the law. And we insist that the legislature have enacted that the certificate of the auditor, "that the provisions of the law have been complied with," shall be evidence of such compliance.

The auditor has made such certificate, and it has been recorded.

BATES, for Appellee.

This is the same case of Morton vs. Reed heretofore acted upon by

this court, see 6 Mo. R. p. 64,) and the principal questions for determination are the same now as then. There arose, however, at the last trial, and now appear upon the record several minor questions, which have to be disposed of, although none of them seem to me to affect the legal merits of the cause, so far as to be capable of changing the result.

These minor questions relate to the exclusion of certain pieces of testimony offered by the defendant, (the appellant here,) and excluded by the court, and with regard to them the appellee says :

1. The bond of Henry Watts, collector of the revenue for Lincoln county, to the governor, was rightly excluded, because it was irrelevant. It had nothing to do with the case. He would have been no less a collector had he never given a bond—besides one bond was already in evidence.

2. The document marked exhibit (A) offered along with the deposition of E. Barcroft, and purporting to be a copy of the delinquent tax list, was rightly excluded, because, *first*, it is not annexed to the deposition, nor in any manner connected therewith, though declared therein to be annexed ; *second*, it appears on the face of the document, and in the certificate of authentication—that it is interpolated and altered from its original condition.

3. The defendant, having failed to produce in evidence either the original, or a copy of the auditor's advertisement of sales for taxes, the court was right in excluding the oral testimony of the contents thereof, which the defendant offered to produce.

I need not cite authorities to prove that the best evidence the nature of the case admits of, must be given; and that to warrant the introduction of the inferior sort, it must be shewn that all proper diligence has been used to get the superior. Here no diligence was used—the party was supine—he and his counsel enquired in some two or three places only ; yet the law shows that the advertisement must have circulated co-extensively with the State ; every county being entitled to several copies ; to say nothing of the general circulation of the paper in which it was printed. But if I be wrong in regard to any one or more of the above points, still, if the court see from the whole record that the judgment is for the right party, the judgment will not be reversed for a harmless error. The court excluded from the jury both the certificate of sale, and the deed made by the auditor to Jos. R. Suggitt, for the land in question, and this was right; because, *first*, this cause presents to the court precisely the same questions as would have been presented, if the documents had been admitted, and an instruction given that they passed title; *second*, the auditor's sale to Suggitt, is illegal and void—

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because, *first*, the proceedings being by legislative act in derogation of common right, the statute itself must be strictly construed against the power; *second*, being *ex parte*, and under special authority, the greatest strictness is required, nothing can be presumed in favor of the act, but every requirement of the law must be complied with. 4 Pet. R. 349; 5 Cond. R. 28; 2 Cond. R. 151; 4 Cond. R. 395; 19 J. R. 7; 20 Wend. 241; and see especially Cook & Thurston vs. Peebly, 8 Mo. Rep. 344; 4 Hill (N. Y.) R. 92; and *ib.* 76; see also this same case in 6 Mo. R. 64.

The defendant should have proved that the tax remained unpaid, but has not done it; Barcroft's deposition only says it was not paid to him.

4. The certificate of the auditor, under the act of 3d Jan., 1827, cannot help the defendant's title, because, *first*, the certificate is not such as the law requires—it states broadly that the requisites of the law have been complied with; whereas it should have stated facts, and left the court to judge what the law requires; *second*, but if it were in the best form, it could only authenticate the facts of which the auditor has official cognizance, and not facts foreign to his office. U. S. vs. Jones, adm'r of Orr, 8 Pet. R. 375; 1 Mo. R. 537; 2 Bibb R. 573; Acts 1826-7, 149.

5. There is no proof of any legal advertisement of the auditor's sale; and *first*, the copy stated in the record, (as Barcroft's deposition, and in the certificate of sales under the act of 1827,) is defective in itself, and there is no proof of its being printed and published; *second*, it is not proved that three copies were sent to, and set up by the sheriff, as required by the act of 18th Jan., 1831, § 4.

6. By the copy of advertisement and certificate of purchase, it appears that the auditor sold the land not only for taxes and penalties, but for interests and costs, which was illegal.

7. It appears by the record, that the land was sold not only for State and county taxes, interest, penalties and costs, but for two additional taxes imposed by the act of 3rd January, 1827, § 20, which additional taxes were illegal, not being *ad valorem*, as required by the constitution, art. 13, § 9.

8. The land could not be sold for the non-payment of taxes, until there was an ascertained defect of personal property. R. C. of '25, § 21 to 28, title Revenue.

By § 27, the collector had a general power to distrain goods. But if no such power were expressly given, it is a necessary incident to the power and duty to collect taxes.

9. The goods being first liable, the land could not be sold without an

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official return or statement, and that on the record, of *nulla bona*. 2 Cond. R. 151; 5 Cond. R. 28; 4 Pet. R. 366.

10. Supposing the auditor's sale formal and regular, still, the defendant's title deeds are invalid as against the plaintiff, for want of record. See the date of the recording of the deeds, and R. C. of 1825, p. 674, § 28; and same code, p. 221, § 14.

N. B. The auditor's certificate of sale to Suggitt bears date June 20th, 1832; recorded, January 13, 1836.

The deed from the auditor to Suggitt, under the certificate, bears date June 25th, 1834; recorded 14th January, 1836.

Scott, J., delivered the opinion of the court.

This was an action of ejectment brought by Morton to recover the possession of a tract of land containing two thousand arpents, situated in Lincoln county, in which Morton recovered judgment.

Morton claimed under Paul Chouteau, to whom a concession was made by the Spanish government, which was afterwards confirmed to him by the authority of the laws of the United States. Chouteau conveyed to Laveille and Morton, for the sum of three thousand two hundred and fifty dollars; and Laveille to Morton, for the sum of three thousand four hundred and forty dollars.

Reeds claimed the land in controversy under Joseph R. Suggitt, who claimed under a deed from the auditor of public accounts, which was executed on the 25th June, 1834 in pursuance of a certificate of sale made to the said Suggitt, which bore date on the 20th day of June, 1832, for the non-payment of the State and county taxes due on the said land for the year 1831. The amount of the taxes, penalties and costs was nine dollars and seventy-seven cents. The certificate of sale was recorded on the 13th January, 1836, and the deed of the auditor on the 14th Jan'y of the same year. The deed of the auditor was acknowledged, but the certificate was placed on record without acknowledgment.

After a great deal of testimony had been offered in evidence, much of which was rejected, the certificate and deed above referred to were produced in evidence to the court, and were rejected, to which exceptions were taken by the defendant Reeds, who has brought this case here.

The merits of the case depending on the facts above set out, and as the defendant cannot maintain his defence without showing the validity of the certificate and deed above referred to, we do not deem it neces-

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sary even to state, much less to determine, the many points which have been raised in the argument of this cause.

The 28th section of the act to provide for levying, assessing and collecting State and county taxes, approved March 1st, 1825, after prescribing the manner in which the several collectors of the revenue shall sell the lands of delinquent residents who fail to pay their taxes, directs that the collector shall deliver to the purchaser of any tract of land or lot, or any part thereof, a certificate of such sale, which certificate shall be recorded in the same manner as deeds for lands; and from and after the time of such sale, the lands and lots so sold shall be assessed to, and the taxes paid by the purchaser.

The 31st sec. of the same act prescribes that lands thus sold may be redeemed by the owners thereof within two years from and after the sale, and directs that if they are not redeemed within that time, a deed shall be made to the purchaser by the collector.

The 26th sec. of the same act, modified by the act of January 23d, 1829, prescribes the manner in which the auditor shall conduct the sale of delinquent non-resident lands, and after directing that they shall be advertised and sold for the taxes, penalties, &c., proceeds to enact that in all other proceedings relating to the sale of said lands, the auditor shall perform the like duties as are required by this act of the collector, in case of sales made by him, and all subsequent proceedings had thereon shall be as is required by this act, in case of lands sold by the collector, and the auditor performing in that behalf the duties enjoined on collectors in the cases aforesaid.

The 29th section of the same act makes it the duty of the collector immediately after a sale for taxes, to make out and certify duplicate lists of sales made by him to individuals, specifying the name of the person to whom sold, describing the land sold, &c.; one of which lists so certified he shall deliver to the clerk of the county court, and the other to the recorder of the county, and the clerk and recorder shall keep such lists in their offices for the inspection of any person interested.

The 11th section of the act of Jan'y 3, 1827, amendatory of the preceding act relative to the assessing and collecting State and county taxes, as modified by the act of Jan'y 23d, 1829, makes it the duty of the auditor, upon all sales of real estate for the taxes due thereon, to transmit to the recorder of the county wherein the real estate is situated, a copy of the advertisement of sale, certified to be a true copy, and a further certificate that the provisions of the law in such cases made and provided, have been complied with; which advertisement and certificate shall be recorded by the recorder among the deeds, and a copy

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of such record shall be *prima facie* evidence of the facts contained in such certificate, whenever a sale made under such advertisement shall come in question; and the certificate of sale to be given to the purchaser in such case, shall always refer to the advertisement of record under which such sale was made.

This case was once before in this court, (6 Mo. R. 64,) and on the authority of the case of Williams vs. Peyton's lessee, 4 Wheat. 77, a principle was established by a majority of this court, to which we still adhere. The defendant in that case, claimed the land as a purchaser at a sale made for the non-payment of a direct tax imposed by act of Congress. On the trial the defendant proved that the tax had been assessed against the plaintiff on the land in dispute, and also gave in evidence the deed of the officer. It was also shown that the plaintiff had not paid the tax, nor redeemed the land, and then it was contended that the evidence was enough to show that the land had been duly advertised by the collector, and that the other requisites of the law had been complied with, so as to warrant the execution and delivery of the deed. But the court, Marshall, C. J., delivering the opinion, held otherwise, saying, that as the collector had no general authority to sell lands at his discretion for non-payment of tax, but a special power to sell in particular cases described by the act, those cases must exist, or the power does not arise. It is a naked power, not coupled with an interest, and in all such cases, the law requires that every pre-requisite to the exercise of that power, must precede its exercise. 'The agent must pursue his power, or his act will not be sustained by it. As to the deed being evidence of the acts which ought to have preceded it, it was said, that the party who sets up a title must furnish the evidence necessary to sustain it; that if the validity of a deed depends on an act in *pais*, the party claiming under it, is as much bound to prove the performance of the act, as he would be to prove any matter of record, on which the validity of the deed might depend. It forms a part of the title; it is a link in the chain which is essential to its continuity, and which it is incumbent on him to preserve. A person should examine these facts before he becomes a purchaser, and the evidence of them should be preserved as a necessary muniment of title. Therefore the deed in such cases is unavailing entirely, unless the performance of the pre-requisites to the giving it be affirmatively shown. A similar doctrine has been asserted in other cases in the supreme court of the United States. Stead's ex'r vs. Conage, 4 Cr. 403; Parker vs. Rules' lessee, 9 Cr. 64. In the case of Jackson vs. Sheperd, 7 Cow. 88, the supreme court of New York, speaking of the case of Williams vs. Peyton, says,

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the principles on which it is founded are of general authority and application, and seem to be incontrovertible.

The court of appeals in the State of Virginia, in the case of Nalle vs. Fenwick, 4 Ran., maintain the same principle, and hold that when land is sold by a sheriff for the non-payment of taxes, it is incumbent on the purchaser to show that all the steps have been regularly taken, which the law requires in such cases.

The same principle prevails in New Hampshire, 3 N. H. Rep 340, Waldron vs. Tuttle, and is recognized in Louisiana, 6 Mar. Nancarrow vs. Weathersbee.

The case of Ives vs. Lynn, 2 Conn. Rep. and the case of Hickman vs. Skinner, 3 Mon. 311, and others in Kentucky, maintain a contrary doctrine, but we do not think their weight is sufficient to overturn the authority of the above cited cases determined by the first courts of the Union, and warranted by principles of law.

The case of Pejupscut vs. Ranson, 14 Mass. 147, affords no aid or authority to the above cited cases from Connecticut and Kentucky. In that case the purchaser, and those claiming under him, had been in possession of the land in controversy since the sale, and for upwards of thirty years; the deed of the officer was read in evidence, and the facts and circumstances going to show that the pre-requisites of the law had been complied with, were left to the jury, with an instruction that they might presume every thing required by law had been done, from the great length of time which had intervened between the sale and the commencement of the suit. This case evidently rests on a different principle from those above cited.

We adhere to the foregoing doctrine asserted when this case was formerly in this court. That the officer in making a sale of lands for the non-payment of taxes, has a mere power which must be strictly pursued, and all the prerequisites must be shown to have existed which were necessary to have enabled him to exercise it in a valid manner. We do not pretend, however, that this principle of law cannot be modified or abolished, as to the wisdom of the legislature may seem best. To what extent it was modified or altered by the 11th sec. of the act of January 3d, 1827, we do not now think it necessary to determine. Whether it was intended that the further certificate provided for by that section should be *prima facie* evidence that the law had been complied with so far as the acts of the auditor were concerned, or whether it was intended to be evidence that the law had been complied with by all those who had any agency in assessing and collecting the

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revenue, it is clear that it could not be evidence of facts to be done subsequently, and that too by the person to whom the sale was made.

The 28th section of the act of 1825, above cited, required the certificate given to the purchaser at the tax sale to be recorded; and a subsequent section provided that if lands sold for the taxes were not redeemed within two years from the date of the sale, the auditor should then make a deed for them. The sale in this case took place on the 18th June, 1832, and the certificate bore date the 20th of the same month, and was not placed upon record until the 13th January, 1836. The deed for the land was executed to the purchaser on the 25th day of June, 1834. If the certificate was not recorded before the execution of the deed, it could hardly have been of any avail to have recorded it afterwards. The recording of the deed answered all the purposes designed by a record of the certificate. Here then is a material act to be done by the purchaser, which he has failed to do. The owner of the land had two years within which he might have redeemed it. Had the certificate of sale been seasonably placed on the record of deeds, might not some one have seen it and communicated the fact to the owner? might not some rumor by that means have been spread abroad which would have reached his ears? But the party has withheld this instrument from record, when he was required by law to place it there, and we can see that the owner of the land may have sustained an injury in consequence of this neglect. But according to the principles above asserted, we do not feel ourselves called upon to give reasons why this thing should have been done. He who wishes to obtain an estate worth thousands, for less than ten dollars, under and by virtue of the law, is not to be permitted to ask why he should be required to do this or to do that. It is an answer, that it is required by law. *Ita lex scripta est.* He claims by the law—then by that law let his pretensions be judged. *Ives vs. Lynn*, 2 Cow. Rep. 505; *Tilson vs. Thompson*, 10 Pick.

It was maintained in the argument for the defendant, that the object of the law in requiring the certificate to be recorded, was that it might be known who was liable for the subsequently accruing taxes on the land. That the 29th sec. of the act of 1825, above cited, required two descriptive lists of the lands sold for taxes to be sent to each county; one to the clerk of the county court, and the other to the recorder; by this means there was notice communicated to those whose lands had been sold. From the records of this case, it does not appear that the purchaser paid the taxes subsequently accruing, or that the provisions of the above sections were complied with. But even if they had been,

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if a list of the lands sold had been sent, one to the clerk of the county court, and another to the recorder, to be kept in their respective offices for the inspection of all interested, still if the certificate had been placed among the record of deeds, would it not have multiplied the chances of bringing to the owner a knowledge of the fact that his land had been sold. Thousands examine the record for deeds, who would never inquire for the list of lands sold for taxes, in which but comparatively few are interested. We are of opinion that the object of the law in requiring the auditor's certificate of sale to be recorded, was not that it might be known who was liable for the accruing taxes on the land sold, but it was designed as one means of communicating to the owner the fact that his land had been sold. That the placing of it on record after the time for redemption was past, was a nugatory act; that it should have been seasonably recorded, and the failure to do so renders it void, and by consequence the auditor's deed.

The other Judges concurring, the judgment will be affirmed.

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